TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 139

CHARLES M. THOMSON, TRUSTEE FOR PROPERTY OF CHICAGO & NORTHWESTERN RAILWAY COMPANY, ET AL., PETITIONERS,

vs.

BARNEY E. GASKILL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 6, 1941.

CERTIORARI GRANTED OCTOBER 13, 1941.

SUPREME COURT OF THE UNITED STATES

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INDEX.

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—7157

[fol. a]

[Caption omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT IN AND FOR THE STATE OF NEBRASKA, OMAHA DIVISION

No. 42 Civil

BARNEY E. GASKILL, RALPH T. NICHOLS, WILLIAM A. COSSIART, Earl R. Farmer, Albert B. Benson, George O. Gill, John P. Lewis, Marvin V. Bergland, Clem Miller, Frank E. Faris, Melvin Perrine, Arthur L. Holtzman, Charles Ihlenfeld, Fred H. Goodhart, William J. Alfson, Arthur C. Langhrey, Ross A. Allen, Lloyd L. Bloomer, Harry E. Moolick, Harley W. Porter, Frank Patterson, James A. McCarthy, Frank E. Swearingen, Gail L. Malmquist, Charles F. Strahan, Clyde C. Finley, William R. Bitney, Leo V. Gildea, Ura C. Fox, Bertram E. Biernes, Chan E. Wood, Arthur E. Skoog, John H. Zeissler, John H. Mordhurst, LeRoy S. Wilkins, Richard A. Grauel, Patrick F. Carney, Charles E. Degallez, Glenn R. Nesbit, and Glenn A. Moore, Charles Russell, Plaintiffs,

vs.

CHARLES P. MEEGAN, Trustee for the Chicago and Northwestern Railway Company, a corporation, and George Kimball, (both non-residents), Defendants

PETITION—Filed May 8, 1939

[fol. 2] Come now the plaintiffs and for cause of action against the defendants and each of them states:

1. That all of the plaintiffs are residents of the State of Nebraska, and were at all times hereinafter mentioned employees of the defendant railroad company, The Chicago & Northwestern Railway Company, which was a corporation organized under and by virtue of the laws of the State of Illinois, and is an Illinois corporation with its principal place of business in the City of Chicago, and that it is now in process of reorganization under the National Bankruptcy Acts, and the defendant, Charles P. Meegan has been appointed trustee under order of the United States District

Court in the City of Chicago, and all these plaintiffs are still in the employ of said Charles P. Meegan, trustee.

2. That said bankruptcy court in the United States District Court at Chicago passed a general order, which is now enforced, authorizing all suits which formerly affected the Chicago & Northwestern Railway Company, and all suits affecting the present trustee to be brought in the name of said trustee in any court of competent jurisdiction either State or Federal, with like force and effect as though said proceeding was presented before the bankruptcy court, or as though said railroad company was not in process of reorganization in said bankruptcy court.

3. That all of said plaintiffs entered the service of the Chicago & Northwestern Railway Company as trainmen at various times, operating on trackage, which is now known as the Nebraska Division, but which has been known by different names at different periods, and have been employed in said capacity until the present time, and the defendant railroad company, and its trustee now operating its business is an interstate railroad maintaining and operating railway lines throughout the state of Nebraska, with its principal office at Chicago, Cook County, Illinois.

4. That said plaintiffs are some of them members of what is known as the "Order of Railway Conductors" a voluntary association of men employed, organized for the purpose of bettering themselves as to their wages and better working conditions. That part of said plaintiffs are members of another such voluntary association known as [fol. 3] the "Brotherhood of Railroad Trainmen" a [similiar] organization, and several of said plaintiffs formerly belonged to said unions and have dropped out for various reasons, and some never did belong to either of said unions or any other railroad employees organization.

5. Plaintiffs further state that during all the time that these employees have been working for the railroad company and its trustee they have been working under written contracts, referred to sometimes as the "Schedule of Wages and Rules of Compensation for Conductors and Trainmen", and later said contracts were separated with reference to ...ainmen and railroad conductors. That during all of said time, however, said written contracts provided that the said employees shall have what is known as seniority rights with

reference to said employment. That said contracts at all times provided, "that the seniority rights of trainmen shall date from the time that they are employed as such, and that in promoting men to conductors the senior men will be first examined, and that the seniority rights of a conductor shall date from the day of his promotion, and that the men shall be allowed their choice of runs on the basis of such seniority, which shall be confined to the division on which they hold rank." Said contract further provided at all times "that at the end of each year the superintendent of the railroads should prepare seniority lists, a copy of which should be published on the division bulletin board and copies [whould] be furnished the local chairman of the Order of Railway Conductors and the Brotherhood of Railroad Trainmen. And senior trainmen applying for runs shall be assigned to said runs, further providing, that when trainmen operate over more than one division involving more than one seniority districts percentage of miles run over each division will govern in assignment to such runs."

6. These plaintiffs further state that while these agreements were made between the railroad company and the voluntary association above referred to, they were made for the use and benefit of all employees irrespective of whether they were union men or not, and said contracts always specifically provided "that said rules and regulations constitute in their entirety an agreement between the [fol. 4] Chicago & Northwestern Railway Company and its conductors and trainmen." And all the plaintiffs have been throughout their employment, treated alike with reference to said rules and regulations, except as is hereinafter complained of in this controversy.

7. Plaintiffs further state that they belong to what is known as the Nebraska Division of Trainmen, in the employ of the Chicago & Northwestern Railway Company and its trustee, and the defendant George Kimball, another employee of the Chicago & Northwestern Railway Company, and its trustee, but belongs to what is known and designated as the Sioux City Division of defendants trainmen, and he is a non-resident of the State of Nebraska, and is a resident of the State of Iowa, residing at Sioux City, Iowa, and he is made a defendant here as a representative of said division, for the reason that the numbers vary and the names are unknown, so that he may if he so desires

represent said Sioux City Division of Railway Trainmen and Conductors.

8. Plaintiffs further state that the controversy arises over the division of seniority rights between the Nebraska Division to which plaintiffs belong, and the Sioux City Division to which the defendant George Kimball belongs, over the Northwestern road from Omaha, Nebraska to Sioux City, Iowa. That the trains as run between these two points compromise interdivisional runs, by reason of the fact the trains move over 31.3 miles of the Nebraska Division, or 30.7 per cent of the distance between the two points Omaha and Sioux City, Iowa, and that said runs move over 70.4 miles over the Sioux City Division or 69.3 per cent of the distance between two points. The Nebraska Division covering the mileage from Omaha to Blair, Blair east to Missouri Valley and back to Omaha, while the Sioux City Division covers the trackage from Missouri Valley to California Junction and northerly to Sioux City, Iowa.

9. Plaintiffs, alleging that when trains are operating over two or more seniority districts that conductors and brakemen on the district involved, are entitled to seniority rights on mileage percentage basis on miles run over each seniority district.

[fol. 5] 10. Plaintiffs further state that during all the times that these plaintiffs were in the employ of the defendant company, prior to May 1, 1930, this was the basis upon which the seniority rights were recognized and enforced, but that on said May 1, 1930, the defendant railroad company and its successor defendant trustee has refused to assign to plaintiffs any of the work over said trackage between the two said points above referred to, although they have been frequently requested so to do, but on the contrary have given to the Sioux City Division all of said work, which should have been divided proportionately as above alleged between the Sioux City Division and the plaintiffs herein, although the plaintiffs have at all times been on the regularly assigned list showing their seniority rights.

11. These plaintiffs have been ready and willing at all times to perform said train service over the Nebraska Division between Omaha, Nebraska, and California Junction, Iowa, and the work between Omaha, Nebraska and Sioux City, Iowa, on said interdivisional train runs.

12. The plaintiffs further state that the defendant railroad company and its trustee now representing it, claim that the rights herein sought to be enforced by the plaintiffs under their seniority rights privileges have been abrogated by an alleged agreement between the said defendant railroad trainmen, and the order of Railway Conductors above referred to, which the new alleged agreement they claim has cut off the rights of plaintiffs to their proportionate share of the work as herein complained of, but these plaintiffs allege that they were not parties to said agreement, that if such an agreement was entered into they had no knowledge of said agreement, were not present or represented when said agreements were made, and therefore, any attempted agreement purporting to deprive them of their seniority rights which are property rights belonging to each individual employee would be and is unconstitutional and in violation of the Fifth Amendment of the Federal Constitution, which would deprive them of their property without due process of law, and is, therefore, null and void as to them:

[fol. 6] 13. Plaintiffs further allege that on account of the wrongful deprivation by the defendant and said railroad of their seniority rights they have been damaged, and the value of their property rights in said seniority rights have been taken away, in a sum far in excess of the sum of $3000.00, exclusive of interest and costs, to each of said plaintiffs herein.

14. Plaintiffs further allege that they have sought to have their rights protected through the Brotherhood of Railroad Trainmen, and Order of Railway Conductors but that said organizations have denied them any relief.

15. Plaintiffs further allege that they have even taken the matter of their deprivation of their seniority rights before the Railroad Labor Board, and that the Labor Board have denied them any relief upon the ground that they have no jurisdiction to adjust the matter in controversy.

16. Plaintiffs further allege that they have no adequate remedy at law in bringing individual suits on behalf of each of them, for the reason that it would involve the necessity of making all the other parties either plaintiffs or defendant, and would involve a multiplicity of suits when all the rights can be determined in one suit.

17. Plaintiffs further allege that in order to determine the exact amount of damages that each have sustained on account of the wrongful acts herein complained of, it will be necessary to make an audit of the Chicago & Northwestern Railway Company records, and those of the defendant trustee, and the plaintiffs allege that they have such records showing the precise moving of all this freight over the various areas complained of, and who moved said freight.

18. Plaintiff's further allege that during the time of the Federal Control of Railroads during the World War an arrangement was made between the Chicago & Northwestern Railway Company and the Chicago, St. Paul, Minn. & Omaha Railroad, which operated a system from Omaha to Sioux City on the Nebraska side, whereby that order jointly gave both the M. & O. & N. W. Freight to avoid excessive switch charges, the agreement providing that the M. & O. shall get 25% of the joint carriage of [fol. 7] freight, and the Northwestern 75%, and as to this arrangement the plaintiffs make no complaint, but it will be necessary to take that matter into consideration in order to determine the rights of plaintiffs, as plaintiffs, contend that their seniority rights should be applied so as to allow them 30.7% of the 75% which under said contract represents the Northwestern freight traffic.

19. Plaintiffs further allege that the seniority lists above referred to which have been yearly prepared and published by the railroad company and its trustee above referred to gives the names of all the employees in the Nebraska Division together with the dates of their seniority.

Wherefore, plaintiffs pray that they be entitled to their seniority rights as herein set forth, and that an accounting be had of the amounts due the various plaintiffs herein in the order of their seniority rights, and that the defendants be compelled to produce the records of the railroad company showing the traffic handled in the matter in controversy, and by whom handled, and amount of work performed, and that an audit be made, or a referee be appointed to determine the amounts due the various plaintiffs, and that judgment be rendered against the defendants, in favor of each individual plaintiff for the amount found due him, and that in the future the railroad or its trustee be compelled to assign to the plaintiffs in the order of their senior-

ity their rights to operate on the runs in controversy, and that the defendant George Kimball, representing the Sioux City, Iowa, Trainmen Division be compelled to recognize plaintiffs seniority rights in said work by the Sioux City Division, which has resulted in [lose] of time and money to the plaintiffs, and that they be reimbursed for said time and money lost as herein prayed, and the defendants also be compelled to recognize said rights until said rights shall be rightfully terminated by the parties hereto, and that they have such other and further relief as may be just and equitable in the premises.

George P. Burger, 313 Patterson Bldg., Omaha, Nebr., & S. L. Winters, 4811½ So. 24th St., Omaha, Nebr., Attorneys for Plaintiffs.

Duly sworn to by Barney E. Gaskill, jurat omitted in printing.

[fol. 8] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF CHICAGO AND NORTHWESTERN RY. CO.—Filed May 29, 1939

Comes now Chicago and North Western Railway Company, Debtor, Charles P. Megan having resigned as Trustee, and Debtor having been ordered by the Bankruptcy Court to carry on until a new Trustee is qualified, and for answer to the petition of plaintiffs filed herein admits the reorganization proceedings under which the Chicago and North Western Railway Company is operating, as alleged in Paragraph 1 of the petition.

II

Admits that said Railway Company operates interstate and has its principal office at Chicago, Illinois.

III

This defendant has no knowledge as to whether the plaintiffs are or are not members of the Brotherhood of Railroad

[fol. 9] Trainmen or Order of Railway Conductors, and, therefore, neither admits nor denies the allegations of Paragraph 4 of plaintiffs' petition, but calls for strict proof thereof.

IV

This defendant admits, as claimed in Paragraph 5 of the plaintiffs' petition that to whatever extent the plaintiffs have worked for the Railway Company or its Trustee, their work was in accordance with an agreement or agreements between the Chicago and North Western Railway Company and the Order of Railway Conductors, for conductors, and the Brotherhood of Railroad Trainmen, for trainmen, generally referred to as Schedule of Wages and Working Conditions as same have existed from time to time, and that said agreements provide for seniority rights in connection with such employment as specifically set forth therein. This defendant alleges affirmatively that plaintiffs and each of them had and have only such seniority rights as may be provided for in said agreements between the unions referred to and the railway company and its trustee, and that apart from such agreements none of the plaintiffs has any seniority rights; that said agreements were not negotiated between the plaintiffs individually and the Railway Company, but between the said unions and the Railway, said unions representing each and all of said classes of employees, whether members of the unions or not; that said unions were and are the sole bargaining agencies of said plaintiffs whether members of the unions or not; that said agreements and contracts were voluntarily made between the unions and the railway company and its trustee, and were and are subject to change and modification, and that to whatever extent the individual plaintiffs have been deprived of any runs, if any, said result was brought about and produced because of supplementary agreements and understandings and arrangements made by the said unions and the said railway company and its trustee which constituted change and modification of said agreements and the obligations and changes and modifications were and are binding upon the plaintiffs and each of them.

[fol. 10] V

For answer to Paragraph 6 of plaintiffs' petition, the Railway Company and its Trustee admit that said agree-

ments and schedules referred to were made for all of the employees in said classes, regardless of whether they belonged to the unions or not.

VI

For answer to Paragraph 7 of the plaintiffs' petition, this defendant neither admits nor denies the allegations thereof.

VII

For answer to Paragraph 8 of plaintiffs' petition, this defendant denies the contention that the track between Omaha and Blair is any part of the Nebraska Division of the Chicago and North Western Railway Company, but alleges that said trackage is owned and operated by Chicago, St. Paul, Minneapolis and Omaha Railway Company; that the only part of the Nebraska Division referred to in plaintiffs' petition and which is involved in this case is 7.5 miles from Blair, Nebraska, to California Junction, Iowa; that from California Junction, Iowa, to Missouri Valley, Iowa, a distance of 5.9 miles, and from California Junction to Sioux City, Iowa, a distance of 69.4 miles, the track is in the Sioux City Division, all as appears from the time tables of the Chicago and North Western Railway Company issued for the guidance of employees; that the definition of a division as promulgated in the book of rules of the Chicago and North Western Railway Company at Page 8 is a section of track under the jurisdiction of a superintendent, and no part of the Chicago, St. Paul, Minneapolis and Omaha Railway Company's track between Omaha and Blair is under the jurisdiction of any superintendent of the Chicago and North Western Railway Company, but is under the exclusive jurisdiction of the superintendent of the Chicago, St. Paul, Minneapolis and Omaha Railway Company.

VIII

For answer to Paragraph 9 of plaintiffs' petition, this defendant admits this to be the generally recognized practice.

[fol. 11] IX

For answer to Paragraph 10 of plaintiffs' petition, this defendant denies the allegations thereof, but alleges that

any and all claims of plaintiffs involving runs and wages accruing more than four years before the filing of this suit are barred by the Statute of Limitations of the State of Nebraska. This defendant further alleges that whatever division of work and wages was made as regards employees of the Nebraska Division as compared to employees of the Sioux City Division, was made pursuant to and in accordance with agreements entered into between the Railway Company and the unions referred to, which agreements are binding upon the plaintiffs and each of them, said unions being recognized as the only bargaining agencies for said plaintiffs, whether they belong to the unions or not.

X

For answer to Paragraph 11 of plaintiffs' petition, this defendant again says that from Omaha to Blair, Nebraska, is not within the Nebraska Division of the Chicago and North Western Railway Company, and that otherwise the facts are as set forth in the previous paragraph hereto.

XI

For answer to Paragraph 12 of plaintiffs' petition, this defendant admits that his contention is that the rights of plaintiffs are to be determined by the agreements made by the Railway Company and the unions referred to, and that such agreements are binding upon the plaintiffs and each of them, whether they belong to the unions or not, and this defendant denies that such agreements violate any of the constitutional rights of plaintiffs, and that the fifth amendment to the Federal Constitution has no application as claimed in said paragraph.

XII

For answer to Paragraph 13 of plaintiffs' petition, this defendant denies that there is involved the sum of $3,000.00 as to each plaintiff; that the petition does not set forth any facts to warrant the conclusion that there is such an amount involved, and this defendant, therefore, denies the jurisdiction of the Court in this case.

[fol. 12] XIII

For answer to Paragraph 14 of the plaintiffs' petition, this defendant is informed and believes that the Brother-

hood of Railroad Trainmen and the Order of Railway Conductors duly considered the individual viewpoint of these plaintiffs in determining what agreements to make with said Railway Company, but notwithstanding that any of such viewpoints may have been contrary to the judgment of said Brotherhood officers, said agreements were made with the Railway Company by said unions, and such agreements are binding upon the plaintiffs and each of them, and such decision does not deny the plaintiffs of any rights, but in fact establishes and defines their rights with respect to seniority.

XIV

For answer to Paragraph 15 of plaintiffs' petition, this defendant admits that it is informed that the plaintiff Gaskill made an application to the First Division, National Railroad Adjustment Board in Chicago for an award concerning the contention of the plaintiffs, but that said Adjustment Board declined to make such award and also declined to docket the complaint, and this defendant says that since said tribunal is constituted by an Act of Congress regulating relation between the railroad companies and the employees and authorizing the bargaining agencies of said employees, to-wit: the unions referred to, to agree upon the schedules, including the definition and application of seniority rights, and since said subjects were agreed upon between the unions and the railway company, said action of the Adjustment Board in declining to docket the Gaskill complaint and the complaint of these plaintiffs was within the jurisdiction of said Board and is binding upon the plaintiffs, and does not deny them any of their rights, nor entitle them to resort to a court of law or equity, notwithstanding the action of the unions and of the Adjustment Board.

XV

For answer to Paragraph 16 of plaintiffs' petition, this defendant says that if plaintiffs have any rights against this defendant upon the claims made in their petition, it is better that they be adjudicated in one suit rather than [fol. 13] in many, but still this defendant denies that the Court has any jurisdiction under all the facts in this case.

XVI

For answer to Paragraph 17 of plaintiffs' petition, this defendant says that it would be inequitable and unjust to order an audit of the books of the Railway Company, except at the sole expense of plaintiffs; that plaintiffs ought to set forth in a bill of particulars their specific demands as separately prayed for in a motion filed herein, but that in any event, if any audit of defendant's books and records is necessary that the Court will first order that the plaintiffs pay in advance such sum of money as may be necessary to make said audit, so that defendant will not be burdened with unreasonable expense in the premises.

XVII

For answer to Paragraph 18 of plaintiffs' petition, this defendant denies that the arrangement between the Chicago and North Western Railway Company and the Chicago, St. Paul, Minneapolis and Omaha Railway Company for the handling of freight was made during the World War, and alleges the fact to be that an arrangement was initiated on August 1, 1926, being an agreement between the two railway companies under the provisions of which Chicago and North Western and Chicago, St. Paul, Minneapolis and Omaha tonnage was handled between Sioux City and Omaha via Missouri Valley and Council Bluffs solely on the tracks of the Sioux City and Iowa Divisions of the Chicago and North Western Railway, none of such trackage being a part of the Nebraska Division. Effective May 1, 1930, and also by agreement between the two companies, the method of operation of trains between Sioux City and Omaha was changed from the route via Missouri Valley and Council Bluffs over trackage of the Sioux City and Iowa Divisions to a route via California Junction and Blair, a route involving Sioux City Division trackage, Sioux City, Iowa, to California Junction, Iowa, 69.4 miles, Nebraska Division trackage California Junction to Blair, a distance of 7.5 miles, and C. St. P. M. & O. trackage Blair to Omaha, a distance of 21.8 miles, and alleges the fact that subsequent to such changed operation an agreement was also made between the unions [fol. 14] and the Railway Company effective as of May 1, 1930; that on account of the freight which theretofore had been hauled exclusively by the Chicago, St. Paul, Minneapolis and Omaha Railway Company on its own tracks west of the

Missouri River between Omaha and Sioux City being diverted over the Chicago and North Western Railway Company's tracks between Blair and Sioux City that a certain number of employees (conductors and trainmen) of the Chicago, St. Paul, Minneapolis and Omaha Railway should be entitled to operate over the Sioux City Division of the Chicago and North Western Railway Company, between Sioux City and California Junction, and the Nebraska Division of the Chicago and North Western Railway Company, between California Junction and Blair (a distance of 7.5 miles), and said agreement has been modified from time to time between the Railway Companies and the labor unions referred to, all of which agreements are binding upon these plaintiffs, as well as the agreements as to the assignment of runs as between Sioux City Division men and Nebraska Division men of the Chicago and North Western Railway Company, and that all of said agreements between the unions and the railway company are binding upon these plaintiffs.

XVIII

For answer to Paragraph 19 of plaintiff's petition, this defendant admits that from time to time seniority lists have been prepared and published on each of the divisions of the Railway Company, including the Nebraska Division thereof.

Wherefore, this defendant prays that the members of the Sioux City Division of the Chicago and North Western Railway Company which may be specified by the plaintiffs in their bill of particulars or otherwise designated as those who received work and wages which plaintiffs claim rightfully belonged to them, be made parties to the suit, and that if any final judgment is rendered in this case, it be rendered against such parties who received such work and wages, rather than against this defendant who has paid said wages in accordance with agreements between the bargaining agencies of the plaintiffs, and the Sioux City Division men.

[fol. 15] Defendant further prays that the Order of Railway Conductors and the Brotherhood of Railroad Trainmen be made parties defendant, and that all of said additional parties be duly served with summons to the end that they may appear and make such answer as they may be advised in the premises.

Defendant further prays the Court that the complaint of plaintiffs be dismissed for want of equity, and that judgment be rendered in favor of this defendant, for its costs herein expended.

Wymer Dressler, Robert D. Neely, H. J. Lutz, Attorneys For Defendant, Chicago and North Western Railway Company, Debtor.

[File endorsement omitted.]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ORDER MAKING BROTHERHOOD OF RAILROAD TRAINMEN AND ORDER OF RAILWAY CONDUCTORS PARTIES DEFENDANT—Filed May 29, 1939

It appearing from the answer of the defendant that the Brotherhood of Railroad Trainmen and the Order of Railway Conductors are vitally interested in the result of this suit, and should be made parties so that they may defend their interest therein,

It Is Ordered that the Brotherhood of Railroad Trainmen and Order of Railway Conductors be and they hereby are made parties defendant in this case. A copy of this order will be served in the usual way upon the nearest officer of each of said organizations.

J. A. Donohoe, United States District Judge.

[File endorsement omitted.]

[fol. 16] IN UNITED STATES DISTRICT COURT

MOTION OF DEFENDANT, GEORGE KIMBALL, TO DISMISS AS TO HIM—Filed June 16, 1939

The defendant, George Kimball, moves the Court as follows:

1. To dismiss the action as against said defendant because the petition fails to state a claim against said defendant upon which relief can be granted.

2. To dismiss the action as against said defendant because the petition shows on its face that the Court is without jurisdiction of the subject matter, in that the petition does not allege facts sufficient to satisfy the requirements of Rule 23 of the Rules of Civil Procedure for the District Courts of the United States, so as to permit said plaintiffs as individuals or as a class to sue said George Kimball as the representative of a class, and that any judgment in favor of any one or more of said plaintiffs against said defendant as the representative of a class would be unenforceable against him as such representative, or any of those whom he is alleged to represent.

3. To dismiss the action as against said defendant because the petition shows on its face that the controversy described therein is one within the jurisdiction of the First Division of the National Railroad Adjustment Board created and acting pursuant to the provisions of the "Railway Labor Act" (U. S. C. A. Title 45, Sec. 151, et seq.), and that the petition does not allege facts sufficient to show that plaintiffs have exhausted their remedies granted by and existing pursuant to said "Railway Labor Act," in that the dispute was one wherein the "Railway Labor Act" gives either party a right of appeal to the National Railroad Adjustment Board as a whole, and also in that no reference of the controversy was ever attempted to be made to the National Mediation Board or to any Arbitration Board thereof, whose awards are appealable to the Federal District Courts, and that the facts alleged do not establish that plaintiffs ever exhausted all their rights and remedies under the collective bargaining contracts between their duly authorized agents and the defendant Railroad, which contracts were duly made, are in force, and are enforceable pursuant to the provisions of said "Railway Labor Act;" and that in [fol. 17] any event if plaintiffs have properly and fully sought and been denied all available relief under said contracts and under said "Railway Labor Act," the petition does not allege sufficient facts to establish other than that the decisions made pursuant to said contracts are final and binding or that the National Railroad Adjustment Board acted other than regularly, lawfully and within the scope of its authority, so as to make its actions and ruling that these plaintiffs were entitled to no relief in the premises whatever be not subject to review by this Court, and that this Court is therefore without jurisdiction of the subject matter.

4. To dismiss the petition as against said defendant because the petition fails to state a claim against said defendant upon which relief can be granted, in that the petition does not allege any justiciable controversy measurable in money between any one or more of said plaintiffs and the said defendant, in that no amount of money is alleged to be due and owing from said defendant to any one or more of said plaintiffs, and that the petition does not otherwise allege any cause of action against said defendant whereby any one or more of said plaintiffs, individually, collectively or as a class, are entitled to any other relief against said defendant.

5. To dismiss the action as against said defendant on the ground that the Court lacks jurisdiction because the amount actually in controversy as to said defendant is less than $3,000, exclusive of interest and costs, in that if any one or more of said plaintiffs have any cause of action against said defendant such would be only to the extent that said defendant may have wrongfully received particular work, wages and seniorities which one or more of said plaintiffs were entitled to, and even if such were properly pleaded they would constitute separate causes of action of the particular plaintiffs so damaged, and would be causes arising under and at different and varying times, circumstances and facts, which causes of action could not properly be joined in one action against said defendant, and neither would any one of said causes nor all against said defendant combined, equal or exceed $3,000 in amount, but that the petition shows on its face that the controversy of amount is colorably and fictitiously stated, in that such amount can only exceed $3,000 by improperly aggregating [fol. 18] and joining the different and separate claims of many plaintiffs alleged to exist against many [indivisuals], which individuals are sought to be brought within the jurisdiction of this Court solely by an action which fails to satisfy or come within the requirements of a class action as defined by the Rules of Civil Procedure applicable to this Court.

Dated June 16th, 1939.

W. C. Fraser, W. M. McFarland, J. M. Grim, (Cedar Rapids, Iowa.) Attorneys for Defendant, George Kimball—Address 637 Omaha Nat. Bk. Bldg., Omaha, Nebraska.

NOTICE OF MOTION

To S. L. Winters and George P. Burger, Attorneys for Plaintiffs, and

To Wymer Dressler, Attorney for Defendant, Charles P. Megan, Trustee for the Chicago and Northwestern Railway Company:

Please take notice that the undersigned will bring the above motion on for hearing before this Court at the United States Post Office Building, Omaha, Nebraska, on the — day of —, 1939.

Dated June 16th, 1939.

W. C. Fraser, W. M. McFarland, J. M. Grim, (Cedar Rapids, Iowa.) Attorneys for Defendant, George Kimball—Address—637 Omaha Nat. Bk. Bldg., Omaha, Nebraska.

[fol. 19] Service of the above notice and motion, and receipt of copy thereof, acknowledged this 16th day of June, 1939.

George Burger, S. L. Winters, Attorneys for Plaintiffs. Dressler & Neely, Attorneys for Defendant, Charles P. Megan, Trustee.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MOTION OF DEFENDANTS ORDER OF RAILWAY CONDUCTORS AND BROTHERHOOD OF RAILROAD TRAINMEN TO DISMISS—Filed September 5, 1939

The defendants Order of Railway Conductors and Brotherhood of Railroad Trainmen move the Court as follows:

1. To dismiss the action because the petition fails to state a claim against the defendants upon which relief can be granted.

2. To dismiss the action because the petition fails to pray for any relief which is within the power of the Court to grant on the facts as alleged in the petition.

3. To dismiss the action because the petition shows on its face that the Court is without jurisdiction of the subject matter, in that the petition fails to allege facts sufficient respectively to establish that plaintiffs have any enforceable rights in the premises or that they have complied with the mandatory requirements of, or procedure under, the collective agreements, or that plaintiffs have exhausted either their remedies under the collective agreements between the defendant railroad and the defendant unions as the sole collective bargaining agents for those classes and crafts of the said railroad's employees, which include the plaintiffs, or their remedies under the Railway Labor Act.

(a) In Paragraph 14 of the petition plaintiffs allege "they have sought to have their rights protected" through the defendant unions and been denied relief. But plaintiffs [fol. 20] do not allege that they have made proper and sufficient application for relief pursuant to the terms and conditions of the binding collective agreements, or that any relief to which they were entitled thereunder has in any way been wrongfully or improperly denied them, or that such rights and remedies were not so limited as to now be extinguished or barred by the same instrument, and valid procedure thereunder, as first gave rise to such limited rights. That said deficiencies in plaintiffs' allegations are not merely technical defects in pleading but go to the substance of the Court's jurisdiction of the subject matter in that it sufficiently appears from the petition, and a sufficient allegation could not be made without establishing, that (1) such action as was taken by the plaintiffs with said unions and under said agreements was not in compliance with said collective agreements and did not serve to initiate or carry forward any recognizable claim but was confined solely to an unauthorized and invalid attempt to have set aside a valid and binding decision duly made pursuant to said agreements on a controversy initiated by and being solely between employees of the Sioux City Division of the Chicago and Northwestern Railway Company and employees of the Nebraska Division of the Chicago and St. Paul, Minneapolis and Omaha Railway Company as to their respective rights to certain runs of a pooled freight service of said two railroads, parts of which were over the tracts of both of said railroads; (2) that such an attempt by the plaintiffs did not comply with the conditions or the pro-

cedure provided for in said agreements for invoking the jurisdiction of the tribunals within the Unions, so as to make it possible for the plaintiffs to exhaust their remedies pursuant thereto; (3) that said controversy wherein the plaintiffs ineffectively attempted to intervene was one primarily between two groups of employees which did not include these plaintiffs, and was not a dispute between a carrier and its employees, and hence was a dispute not within the jurisdiction of the First Division of the National Railroad Adjustment Board under the provisions of the Railway Labor Act; (4) that the claims of the plaintiffs involved a totally different dispute, in that it was one between the carrier and a group of its employees, who are not the employees involved in the first above mentioned dispute, and [fol. 21] that the difference in the disputes is such that the latter was one which might have been within the jurisdiction of said National Railway Adjustment Board; (5) that plaintiffs, instead of validly initiating their own proceedings on said last mentioned controversy and carrying the same through the various procedures, as required and provided for under said collective agreements, and then to the proper tribunal acting pursuant to the Railway Labor Act, chose instead to attempt to carry the other dispute between the other parties to the said Adjustment Board, which dispute was, as aforesaid, one which had been validly and conclusively determined by the tribunals provided for in the collective agreements and was a dispute as to which said Adjustment Board was without jurisdiction of the subject matter; and (6) that all rights ever possessed by plaintiffs in the premises were by virtue of, and limited by, the collective agreements which are binding on the plaintiffs, and the petition on its face shows that by valid decisions under, and provisions of, said agreements, which constitute a part of the limitations applying to said rights, such rights have been validly [extinquished] or have not ripened into a cause of action of which this Court has jurisdiction.

(b) Plaintiffs in Paragraph 15 of the petition allege "that they have even taken the matter of their deprivation of their seniority rights before the Railroad Labor Board and that the Labor Board have denied them any relief upon the ground that they have no jurisdiction to adjust the matter in controversy."

Since long prior to any action by plaintiffs under the Railway Labor Act there has been no body or Board known

as, or with the powers formerly held by, the Railroad Labor Board, and such allegation is wholly insufficient to establish that any dispute, which the plaintiffs had a right to submit to any body or Board acting pursuant to the provisions of the Railway Labor Act, had been duly submitted to any such body so as to properly and validly invoke the jurisdiction of any such body or Board, or that all the remedies open to the plaintiffs under and pursuant to the Railway Labor Act have in any manner been properly presented or exhausted. That said deficiencies in plaintiffs' [fol. 22] allegations in Paragraph 15 of the petition are not merely technical defects in pleading but go to the substance of the Court's jurisdiction of the subject matter in that it sufficiently appears from the petition, and a sufficient allegation could not be made without establishing, that, after first seeking relief in the State Courts of Nebraska and being denied the same because of such Courts' lack of jurisdiction of the subject matter, plaintiffs sought relief from the First Division of the National Railway Adjustment Board under the Railway Labor Act which was denied for lack of jurisdiction, for the reason that the controversy presented was one which had rightfully, and with full and exclusive jurisdiction, been decided conclusively by and pursuant to the collective agreements between the unions and the employer, and that in such cases any other relief which might be available under the Railway Labor Act was "a subject matter to be handled under other provisions in the Act" than those invoked by the plaintiffs and which were provisions not within the jurisdiction of the said First Division of the National Railway Adjustment Board; that such other relief included reference of the controversy, when duly and properly presented, to the National Mediation Board created and acting by and pursuant to the provisions of the Railway Labor Act, and that no attempt whatever has been made by the plaintiffs to refer their controversy to said Mediation Board or in any other way to exhaust all their remedies under the Railway Labor Act, so as to make it possible for this Court to have jurisdiction of the subject matter presented by plaintiffs' petition.

4. To dismiss the action because the Court is without jurisdiction of the subject matter, in that the petition does not allege sufficient facts to establish that the decisions and rulings made pursuant to the collective agreements were

not final and binding on the plaintiffs and within the exclusive jurisdiction of the tribunals deciding the same, or that the national Railway Adjustment Board and said other tribunals did not act regularly, lawfully and within the scope of their authority so as to make such actions and rulings that the plaintiffs were entitled to no relief whatever in the premises and that the plaintiffs had not ex-
[fol. 23] hausted their other remedies be not subject to review by this Court.

5. To dismiss the action for failure of the petition to state a cause of action within the jurisdiction of this Court, in that the petition does not allege sufficient facts to establish that plaintiffs have any rights other than those limited rights which exist by virtue of the collective agreements made for them by their bargaining agents with the defendant carrier, as to which plaintiffs have no vested property or other rights except as provided for and limited in said collective agreements, and the petition both fails to allege that they have, and shows on its face that they have not, brought themselves within such limitations so as to have any rights or remedies which may be enforced in, or over which, this Court has jurisdiction and this Court is therefore without jurisdiction of the subject matter.

6. To dismiss the action because the petition fails to state a cause of action within the jurisdiction of this Court in that the petition does not allege facts sufficient to establish that plaintiffs have exhausted their remedies, as lawfully provided and limited by, and as were duly created and became binding upon and available to the plaintiffs by virtue of, the respective constitutions, statutes, rules, rulings, decisions, schedules and contracts of the labor organizations, and of the various duly authorized officials, bodies, committees and agents thereof, which organizations were at all times referred to in the petition and are at the present time the duly accredited and acting exclusive bargaining agents respectively for the plaintiffs, in respect to the matters for which plaintiffs seek relief in their petition in this cause of action.

7. To dismiss the action for lack of jurisdiction, in that the petition fails to allege facts sufficient to establish that the requisite jurisdictional amount of $3,000.00, exclusive of interest and costs, is in controversy as required by law,

or any other ground sufficient to entitle this Court to assume jurisdiction of the subject matter.

[fol. 24] Dated September 5th, 1939.

W. C. Fraser, W. M. McFarland, J. M. Grimm, Cedar Rapids, Iowa, Attorneys for Defendants Order of Railway Conductors and Brotherhood of Railroad Trainmen—Address: 637 Omaha National Bank Building, Omaha, Nebraska.

Notice of Motion

To S. L. Winters and George P. Burger, Attorneys for Plaintiffs, and

To Wymer Dressler, Attorney for Defendant, Charles P. Megan, Trustee for the Chicago and Northwestern Railway Company:

Please take notice that the undersigned will bring the above motion on for hearing before this Court at the United States Post Office Building, Omaha, Nebraska, on the — day of ——, 1939.

Dated Sept. 5th, 1939.

W. C. Fraser, W. M. McFarland, J. M. Grimm, Cedar Rapids, Iowa, Attorneys for Defendants Order of Railway Conductors and Brotherhood of Railroad Trainmen—Address: 637 Omaha National Bank Building, Omaha, Nebraska.

[fol. 25] Service of the above notice and motion, and receipt of copy thereof, acknowledged this 5th day of September, 1939.

George Berger and S. L. Winters, Attorneys for Plaintiffs. Wymer Dressler, Robt. D. Neely, Hugo J. Lutz, Attorneys for Defendant Charles P. Megan, Trustee.

[File endorsement omitted.]

In United States District Court

[Title omitted]

Order of Court Reserving Ruling on Motions to Dismiss—February 21, 1940

This cause comes on for hearing upon Motions of defendants George Kimball, Brotherhood of Railroad Train-

men and Order of Railway Conductors, to dismiss, the parties hereto appearing by their respective attorneys.

Thereupon, the Court reserves ruling on said Motions until parties to the suit stipulate the facts as to jurisdiction.

It Is Ordered, by the Court, that plaintiffs herein, individually make showing as to the matter of jurisdiction.

[fol. 26] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF LOSS OF PLAINTIFF, BARNEY E. GASKILL—
Filed April 15, 1940

STATE OF NEBRASKA,
County of Douglas, ss:

Barney E. Gaskill, being first duly sworn, deposes and says; that he is fifty years of age, a trainman employed by the Chicago and Northwestern Railroad, and has so been employed since October 1912; that he was promoted to conductor in December, 1917, and his seniority number is fifty-eight on the conductors [rooster] of the Nebraska Division.

That when he entered the service of the Chicago and Northwestern Railroad, seniority rules were in effect, and this agreement regarding interdivisional train runs, "When freight trainmen run over two or more divisions under more than one division superintendent the assignment of runs shall be made on basis of percentage of miles run on each division"; and this agreement was in effect over the entire Railroad which operates through many states.

That since May 1, 1930, the Chicago and Northwestern Railroad has operated trains over thirty-one miles of the Nebraska Division in violation of existing contracts, and at the present time, the Nebraska division trainmen are penalized to the extent of $28.17 daily due to the trainmen of the Sioux City Division performing the train service work over the Nebraska Division.

That Barney E. Gaskill has at all times asked for this work, and has appealed to the minor officials as well as to the President of the Railroad, Fred W. Sargent: that he

was notified by Mr. Sargent through the United States mails in July, 1935, "That the subject had been referred to Mr. Pangle and he had been requested to handle the entire subject in a way that would be fair to all." And the said Barney E. Gaskill was notified by M. E. Pangle, Assistant to the President, through the United States mail under date of May 22, 1934, August 2, 1935 and August 23, 1937, "That the Company and the Labor Organizations had entered into this agreement and he was unable to remedy the existing conditions and if we wished relief to take the subject matter up through the Labor Organizations."

[fol. 27] That suit was filed in February, 1938 in the District Court of Nebraska, asking for relief and a Declaratory Judgment, Chicago and Northwestern attorneys demurred on the ground that, "Remedies had not been exhausted under the Railway Labor Act," and November 2, 1938, Judge Rhine sustained the demurrer.

That on February 13, 1939, Barney E. Gaskill, with a court reporter, appeared at the office of T. S. McFarland, Secretary of the Railroad Adjustment Board, First Division, 220 South State Street, in Chicago, Illinois, to present a petition signed by forty-one trainmen of the Nebraska Division asking for the work they considered themselves entitled to; that Mr. McFarland refused to talk in the presence of the court reporter and after she had left the office, Mr. McFarland acted in an insulting manner and said, "I have written you four letters we will not handle that case, I will give you no receipt for the petition and exhibits, you can go back to Omaha and mail the petition and exhibits," but later in the day his Secretary gave affiant a receipt for petition and exhibits and accepted same; that in a short time petition and exhibits were returned with the notice, "That the Board had refused to docket the case."

That on February 13, 1939, Barney E. Gaskill talked of this subject matter with M. E. Pangle, Assistant to the President of the Railroad and Mr. Pangle stated, "That we trainmen would not be able to handle this case in the Courts as it would cost us $10,000.00."

That to the best of my knowledge and ability I have lost $3,000.00 and in addition expenses away from home due to the fact that Sioux City Division trainmen are performing and have performed train service work over the Ne-

braska Division in violation of existing contracts; and further affiant sayeth not.

Barney E. Gaskill.

Subscribed and sworn to before me this 12 day of April, 1940. George P. Burger, Notary Public. (Seal.)

[File endorsement omitted.]

[fol. 28] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF LOSS OF PLAINTIFF, ARTHUR E. SKOOG—Filed April 15, 1940

STATE OF NEBRASKA,
County of Dodge, ss:

Arthur E. Skoog, being first duly sworn, deposes and says; that he is a resident of Fremont, Nebraska; that he is forty-eight years of age, a trainman employed on the Nebraska Division of the Chicago and Northwestern Railroad, and has been so employed since December 1911; that he was promoted to conductor in December, 1916 and to passenger conductor in 1935 and his seniority number is 57 on the conductors seniority [rooster] of the Nebraska Division.

That when he entered the service of the Chicago and Northwestern Railroad, seniority rules were in effect and an agreement regarding interdivisional train runs, which is in effect at the present time.

That since May 1, 1930 the Chicago and Northwestern Railroad has violated said rules and agreements by allowing Sioux City Division trainmen to perform train service work over the Nebraska Division.

That to the best of my knowledge and ability I have lost $3,000.00, exclusive of interest and costs due to the fact that Sioux City Division trainmen are performing and have performed train service work over the Nebraska Division in violation of existing contracts; and further affiant sayeth not.

Arthur E. Skoog.

Subscribed and sworn to before me this 3rd day of April, 1940. Mabel A. Johnson, Notary Public. (Seal.)

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF LOSS OF PLAINTIFF, EARL R. FARMER—Filed April 15, 1940

STATE OF NEBRASKA,
County of Dodge, ss:

Earl R. Farmer, being first duly sworn, deposes and says; that he is a resident of Fremont, Nebraska; that he is [fol. 29] a trainman employed by the Chicago and Northwestern Railroad and has so been employed since July, 1915; that he was promoted to conductor in December, 1920, and his seniority number is 68 on the conductor's [rooster] of the Nebraska Division.

That when he entered the service of the Chicago and Northwestern Railroad, seniority rules were in effect and an agreement regarding interdivisional train runs, which is in effect at the present time.

That since May 1, 1930 the Chicago and Northwestern Railroad has violated said rules and agreements by allowing Sioux City Division trainmen to perform train service work over the Nebraska Division.

That to the best of my knowledge and ability I have lost $3,000.00, exclusive of interest and costs, due to the fact that Sioux City Division trainmen are performing and have performed train service work over the Nebraska Division in violation of existing contracts; and further affiant sayeth not.

Earl R. Farmer.

Subscribed and sworn to before me this 11th day of April, 1940. Mabel A. Johnson, Notary Public. (Seal.)

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF LOSS OF PLAINTIFF, CHARLES RUSSELL—Filed April 15, 1940

STATE OF NEBRASKA,
County of Dodge, ss:

Charles Russell being first duly sworn, deposes and says; that he is a resident of Fremont, Nebraska; that he

is forty-eight years of age, a trainman employed on the Nebraska Division of the Chicago and Northwestern Railroad, and has been so employed since April, 1916; that he was promoted to conductor in May, 1921 and his seniority number is 73 on the conductor's seniority [rooster] of the Nebraska Division.

[fol. 30] That when he entered the service of the Chicago and Northwestern Railroad, seniority rules were in effect and an agreement regarding interdivisional train runs, which is in effect at the present time.

That since May 1, 1930 the Chicago and Northwestern Railroad has violated said rules and agreements by allowing Sioux City Division trainmen to perform train service work over the Nebraska Division.

That to the best of my knowledge and ability I have lost $3,000.00, exclusive of interest and costs due to the fact that Sioux City Division trainmen are performing and have performed train service work over the Nebraska Division in violation of existing contracts; and further affiant sayeth not.

Charles Russell.

Subscribed and sworn to before me this 11th day of April, 1940. Mabel A. Johnson, Notary Public. (Seal.)

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF LOSS OF PLAINTIFF, ARTHUR L. HOLTZMAN—Filed April 15, 1940

STATE OF NEBRASKA,
County of Dodge, ss:

Arthur L. Holtzman, being first duly sworn, deposes and says; that he is a resident of Fremont, Nebraska; that he is forty-six years of age, a trainman employed by the Chicago and Northwestern Railroad, and has so been employed since May 23, 1917; that he was promoted to conductor in December, 1922, and his seniority number is 80 on the conductor's [rooster] of the Nebraska Division.

That when he entered the service of the Chicago and Northwestern Railroad, seniority rules were in effect and an agreement regarding interdivisional train runs, which is in effect at the present time.

That since May 1, 1930 the Chicago and Northwestern Railroad has violated said rules and agreements by allow-[fol. 31] ing Sioux City Division trainmen to perform train service work over the Nebraska Division.

That to the best of my knowledge and ability I have lost $3,000.00, exclusive of interest and costs, due to the fact that Sioux City Division trainmen are performing and have performed train service work over the Nebraska Division in violation of existing contracts; and further affiant sayeth not.

Arthur L. Holtzman.

Subscribed and sworn to before me this 5th day of April, 1940. Mabel A. Johnson, Notary Public. (Seal.)

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF LOSS OF PLAINTIFF, JOHN P. LEWIS—Filed April 15, 1940

STATE OF NEBRASKA,
County of Dodge, ss:

John P. Lewis, being first duly sworn, deposes and says, that he is a resident of Fremont, Nebraska; that he is fifty-three years of age, a trainman employed on the Nebraska division of the Chicago and Northwestern Railroad, and has been so employed since November 1912; that he was promoted to conductor in December 1917 and his seniority number is 59 on the conductors seniority [rooster] of the Nebraska Division.

That when he entered the service of the Chicago and Northwestern Railroad, seniority rules were in effect and an agreement regarding interdivisional train runs, which is in effect at the present time.

That since May 1, 1930 the Chicago and Northwestern Railroad has violated said rules and agreements by allowing Sioux City Division trainmen to perform train service work over the Nebraska Division.

That to the best of my knowledge and ability I have lost $3,000.00, exclusive of interest and costs due to the fact that Sioux City Division trainmen are performing and have performed train service work over the Nebraska [fol. 32] Division in violation of existing contracts; and further affiant sayeth not.

John P. Lewis.

Subscribed and sworn to before me this 11th day of April, 1940. Habel A. Johnson, Notary Public. (Seal.)

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF LOSS OF PLAINTIFF, MELVIN PERRINE—Filed April 15, 1940

STATE OF NEBRASKA,
County of Dodge, ss:

Melvin Perrine, being first duly sworn, deposes and says; that he is a resident of Fremont, Nebraska; that he is fifty years of age, a trainman employed by the Chicago and Northwestern Railroad, and has so been employed since November 1917; that his seniority number is No. 1 on the Brakeman's [rooster] of the Nebraska Division.

That when he entered the service of the Chicago and Northwestern Railroad, seniority rules were in effect and an agreement regarding interdivisional train runs, which is in effect at the present time.

That since May 1, 1930 the Chicago and Northwestern Railroad has violated said rules and agreements by allowing Sioux City Division trainmen to perform train service work over the Nebraska Division.

That to the best of my knowledge and ability I have lost $3,000.00, exclusive of interest and costs, due to the fact that Sioux City Division trainmen are performing and

have performed train service work over the Nebraska Division in violation of existing contracts; and further affiant sayeth not.

Melvin Perrine.

Subscribed and sworn to before me this 5th day of April, 1940. W. M. Stone, Notary Public. (Seal.)

[File endorsement omitted.]

[fol. 33] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF LOSS OF PLAINTIFF, GLEN A. MOORE—Filed April 15, 1940

STATE OF NEBRASKA,
County of Dodge, ss:

Glen A. Moore, being first duly sworn, deposes and says; that he is a resident of Fremont, Nebraska; that he is forty-six years of age, a trainman employed by the Chicago and Northwestern Railroad, and has so been employed since August, 1913; that he was promoted to conductor in November, 1922, and his seniority number is 82 on the conductor's [rooster] of the Nebraska Division.

That when he entered the service of the Chicago and Northwestern Railroad, seniority rules were in effect and an agreement regarding interdivisional train runs, which is in effect at the present time.

That since May 1, 1930 the Chicago and Northwestern Railroad has violated said rules and agreements by allowing Sioux City Division trainmen to perform train service work over the Nebraska Division.

That to the best of my knowledge and ability I have lost $3,000.00, exclusive of interest and costs, due to the fact that Sioux City Division trainmen are performing and have performed train service work over the Nebraska Division in violation of existing contracts; and further affiant sayeth not.

Glen A. Moore.

Subscribed and sworn to before me this 5th day of April, 1940. Mabel A. Johnson, Notary Public. (Seal.)

[File endorsement omitted.]

In United States District Court

Affidavit of Loss of Plaintiff, Albert B. Benson—Filed April 24, 1940

State of Nebraska,
County of Dodge, ss:

Albert B. Benson, being first duly sworn, deposes and says; that he is a resident of Fremont, Nebraska; that he is forty-six years of age, a trainman employed on the Ne-
[fol. 34] braska Division of the Chicago and Northwestern Railroad and has been so employed since April, 1917; that he was promoted to conductor in May, 1922 and his seniority number is 79 on the conductor's seniority [rooster] of the Nebraska Division.

That when he entered the service of the Chicago and Northwestern Railroad, seniority rules were in effect and an agreement regarding interdivisional train runs, which is in effect at the present time.

That since May 1, 1930 the Chicago and Northwestern Railroad has violated said rules and agreements by allowing Sioux City Division trainmen to perform train service work over the Nebraska Division.

That to the best of my knowledge and ability I have lost $3,000.00, exclusive of interest and costs, due to the fact that Sioux City Division trainmen are performing and have performed train service work over the Nebraska Division in violation of existing contracts; and further affant sayeth not.

Albert B. Benson.

Subscribed and sworn to before me this 15 day of April, 1940. Lloyd C. Blair, Notary Public. (Seal.)

[File endorsement omitted.]

In United States District Court

Affidavit of Loss of Plaintiff, George O. Gill—Filed April 24, 1940

State of Nebraska,
County of Dodge, ss:

George O. Gill, being first duly sworn, deposes and says; that he is a resident of Fremont, Nebraska; that he

is a trainman employed by the Chicago and Northwestern Railroad and has so been employed since June, 1913; that he was promoted to conductor in January, 1919 and his seniority number is 61 on the conductor's [rooster] of the Nebraska Division.

That when he entered the service of the Chicago and Northwestern Railroad, seniority rules were in effect and [fol. 35] an agreement regarding interdivisional train runs, which is in effect at the present time.

That since May 1, 1930 the Chicago and Northwestern Railroad has violated said rules and agreements by allowing Sioux City Division trainmen to perform train service work over the Nebraska Division.

That to the best of my knowledge and ability I have lost $3,000.00, exclusive of interest and costs, due to the fact that Sioux City Division trainmen are performing and have performed train service work over the Nebraska Division in violation of existing contracts; and further affiant sayeth not.

George O. Gill.

Subscribed and sworn to before me this 15th day of April, 1940. R. B. Scharman, Notary Public. (Seal.)

[File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTION OF CHARLES M. THOMSON, TRUSTEE OF PROPERTY OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY, TO DISMISS—Filed May 24, 1940

Comes now Charles M. Thomson, Trustee of the Property of Chicago and North Western Railway Company, and successor to Charles P. Megan, formerly Trustee thereof, and moves the Court that this action be dismissed for want of jurisdiction for the reason that the affidavits and all of them filed by various plaintiffs as to the amount of their demands against the defendants are mere unsupported conclusions and not evidence sufficient to warrant

the Court in assuming jurisdiction of this cause. Said [fol. 36] affidavits should have been sufficiently specific as to amount to a bill of particulars, as heretofore moved by the defendant, but being mere conclusions they are wholly insufficient to warrant the Court in assuming jurisdiction.

Wymer Dressler, Robert D. Neely, H. J. Lutz, Counsel for Charles M. Thomson, Trustee.

Service of the foregoing motion and copy thereof is hereby acknowledged by plaintiffs this 23rd day of May, 1940.

S. L. Winters, George Burger, Counsel for Plaintiffs.

[File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTION OF DEFENDANTS, ORDER OF RAILWAY CONDUCTORS, BROTHERHOOD OF RAILROAD TRAINMEN AND GEORGE KIMBALL, TO STRIKE AFFIDAVITS OF PLAINTIFFS AND TO DISMISS THE PETITION—Filed June 3, 1940

The defendants, Order of Railway Conductors, Brotherhood of Railroad Trainmen and George Kimball, move the Court as follows:

1. To strike the affidavits of Albert B. Benson, George O. Gill, Barney E. Gasgill, Arthur E. Skoog, Earl R. Farmer, Charles Russell, Arthur L. Holtzman, John P. Lewis, Melvin Perrine and Glen A. Moore from the files, for the following reasons;

[fol. 37] (a) That such affidavits were purportedly filed pursuant to the ruling of the Court on February 22, 1940, whereby the Court required counsel for the plaintiffs, to submit and file such showings as he could to establish that the jurisdictional amount was involved in this cause of action as to each plaintiff. The Court at that time ruled that the defendants would have an opportunity to meet any showings which plaintiffs might file, and that the

petition would be dismissed as to each of the plaintiffs who were unable to satisfy the Court that the jurisdictional amount was involved as to each such plaintiff. Said affidavits were filed with the Clerk of the Court in the month of April, 1940, without any notice thereof to these defendants and no copies thereof were served on these defendants or their counsel, and these defendants had no knowledge of such filing until their counsel called the plaintiffs' counsel on May 13, 1940 to ascertain whether plaintiffs intended to make any effort to meet the Court's requirements. That the failure of plaintiffs' counsel to notify defendants' counsel thereof or to serve copies of such affidavits on defendants' counsel is in violation of Rule 5 of the Rules of Civil Procedure now in force and effect.

(b) That in substance the said affidavits merely stated, (1) the date of employment and the date of attaining present seniority rank and number as to each such affiant (2) that the seniority rules created by agreement have been violated, since May 1, 1930, and (3) that to the best of such affiant's knowledge he has thereby lost $3,000, exclusive of interest and costs. That such affidavits contain no material statements of fact whatever, and as to the jurisdictional question are the unsupported conclusions of the plaintiffs, which add nothing whatever to the same conclusions as originally pleaded by all plaintiffs in paragraph 13 of their petition. That even if $3,000 had been lost by each such plaintiff since May 1, 1930, all that part thereof except such as had been lost in the five year period immediately preceding May 6, 1939 would be barred by the statute of limitations. Attached to, marked Exhibits "A" and "B" respectively, and by reference hereby made a part hereof, are counter-affidavits of (A) F. H. Nemitz, an official of the defendant Order of Railway Conductors, and (B) O. G. Jones, an official of the defendant [fol. 38] Brotherhood of Railway Trainmen, both of whom are familiar with the railroad operations involved, which negative the said conclusions of the affidavits of said plaintiffs.

2. The motions of said defendants to dismiss plaintiffs' petition are hereby renewed, for the reasons as therein stated, especially for the reason contained in paragraph 7 of the said motion of the defendants Order of Railway

Conductors and Brotherhood of Railroad Trainmen to dismiss, which has heretofore been submitted to the Court, and further because the plaintiffs have failed to make any showing of the jurisdictional amount being involved as to any of said plaintiffs, as required by order of this Court.

Dated June 3rd, 1940.

W. C. Fraser, W. M. McFarland, J. M. Grimm, (Cedar Rapids, Ia.) Attorneys for Defendants, Order of Railway Conductors, Brotherhood of Railroad Trainmen and George Kimball.

NOTICE OF MOTION

To S. L. Winters and George P. Burger, Attorneys for Plaintiffs, and To Wymer Dressler, Attorney for Defendant, Charles P. Megan, Trustee for Chicago and Northwestern Railway Company:

Please take notice that the undersigned will bring the above motion on for hearing before this Court at the United States Post Office Building, Omaha, Nebraska, on the day of , 1940, at o'clock, M.

Dated June 3rd, 1940.

W. C. Fraser, W. M. McFarland, J. M. Grimm, (Cedar Rapids, Ia.) Attorneys for Defendants, Order of Railway Conductors, Brotherhood of Railroad Trainmen and George Kimball.

[fol. 39] Service of the above notice and motion and receipt of copies thereof acknowledged this 3rd day of June, 1940.

George Burger, S. L. Winters, Attorneys for Plaintiffs. Wymer Dressler, Dressler & Neely, Attorney for Defendant, Charles P. Megan, Trustee for Chicago and Northwestern Railway Company.

EXHIBIT "A" TO MOTION

(Affidavit of F. H. Nemitz.)

STATE OF IOWA,
Linn County, ss.:

I, F. H. Memitz, being first duly sworn, depose and say that I am at present living at Cedar Rapids, Iowa. I am

fifty-nine (59) years of age. I am a director and vice president of the defendant Order of Railway Conductors of America, and have been such director and vice president continuously since September 1, 1920.

I began railroading about June, 1903, as a freight brakeman, and in September, 1907 was promoted to freight conductor. I continued to act as freight conductor on the Southern Pacific lines until I was elected general chairman of the craft of conductors on said Southern Pacific lines, which was on January 1, 1918. I continued as general chairman of the craft of conductors on the Southern Pacific lines until I became director and vice president of the Order of Railway Conductors of America.

As general chairman of the conductors for the Southern Pacific lines, I had approximately ten thousand (10,000) miles of railroad under my charge, and fifteen hundred (1500) members of the Order of Railway Conductors, besides many other members of the craft who were not members of the Order of Railway Conductors. The general committee consisted of sixteen (16) members.

[fol. 40] As said general chairman during said period of time on said ten thousand (10,000) miles of railroad, all kinds and characters of grievances and questions in reference to the alleged rights of conductors among each other and with the railroad company arose, and I became generally familiar with railroad operations and with the problems that usually arise and have arisen between groups of conductors and between conductors and the employing railroad.

As a member of the Board of Directors and vice president of the Order of Railway Conductors of America, I have had further experience in reference to difficulties such as are set forth in this case of Gaskill, et als. vs. Megan, et als. I have been in the field on various occasions having hearings and making general investigations in reference to these difficulties which arise between groups of conductors and between conductors and the railroads. I have had the same experience in my office as a director and vice president.

I am familiar with the Chicago & Northwestern Railway Company operations and the runs involved for Chicago & Northwestern train crews operating any Chicago & Northwestern runs over any trackage between Omaha, Nebraska

and Sioux City, Iowa for the five year period preceding May 6, 1939, and I am familiar with the respective seniority rights of Chicago & Northwestern employees created by collective bargaining agreements and the rules and regulations made pursuant thereto; that any such railroad runs as aforesaid which were not handled by crews from the Nebraska Division of the Chicago & Northwestern employees as to which there could be any question as to the said Nebraska Division of Chicago & Northwestern employees having any seniority rights by virtue of any collective bargaining agreements or rules and regulations made pursuant thereto would necessarily, by virtue of the physical ownership and operation of the trackage and lines involved, be confined to that approximately seven and one-half (7½) or eight (8) mile stretch of track between Blair and California Junction; that during said five year period it was physically impossible for any one of the ten (10) plaintiffs who filed affidavits concerning the existence of the federal court jurisdictional amount being involved in said cause of action, to individually have been entitled by seniority [fol. 41] to such runs and been denied enough work over said seven and one-half (7½) to eight (8) miles of track in order to have lost Three Thousand Dollars ($3,000) exclusive of interest and costs.

Shortly after May 10, 1939 I was asked by J. M. Grimm, of the firm of Grimm, Elliott, Shuttleworth & Ingersoll, in Cedar Rapids, Iowa, general counsel of the Order of Railway Conductors of America, to make a thorough examination and investigation of the files and facts in the case. I took all the office files and made a thorough study of the entire record, and I am thoroughly familiar with the same. I have read the petition in this case and I am familiar with the claims of the plaintiffs and each of them.

Some of the claims of the plaintiffs as set forth in this case have been pending in one form or another for a number of years. There have been involved in the controversy two railroads, the Chicago & Northwestern Railway Company (hereinafter for brevity called C. & N. W. Ry. Co.), and the Chicago, St. Paul, Minneapolis & Omaha Railroad (hereinafter for brevity called C. St. P. M. & O. Railroad). The C. & N. W. Ry. Co. owns and operates a railroad which, so far as this case is concerned, runs westward from Chicago, Illinois, through Missouri Valley, California Junction, Blair

and Fremont, Nebraska. The C. St. P. M. & O. Railroad owns and operates a railroad, among other places, from Omaha, Nebraska, through Blair, Nebraska, and on the west side of the Missouri River to a bridge over the Missouri River near Sioux City, Iowa, to Sioux City, Iowa. In other words, the C. & N. W. Ry. Co. and the C. St. P. M. & O. Railroad cross each other at Blair, Nebraska.

The C. & N. W. Ry. Co. owns a controlling interest, but not all, of both the preferred and common stock of the C. St. P. M. & O. Railroad, and has so owned said stock for an indefinite period of time, but the two railroads are entirely separate and distinct in their management and operation, and have been two separate and distinct railroads during all the time involved in this suit.

The term "seniority", as used in this and similar cases, and as applied to railroad operation, means age in service in a particular craft, and as applied to the craft of con- [fol. 42] ductors it means the date when a conductor was promoted or began service as a conductor on the C. & N. W. Ry. Co., or was promoted or began service as a conductor on the C. St. P. M. & O. Railroad.

Seniority is based upon and enforced entirely by collective bargaining contracts made between craft unions and railway companies, commonly known as schedules. That is to say, seniority on the C. & N. W. Ry. Co. for a conductor is based on a collective bargaining contract or schedule made by the Order of Railway Conductors with the management of the C. & N. W. Ry Co., and pertains only to rights and remedies on the property operated by the C. & N. W. Ry. Co.

Seniority on the C. St. P. M. & O. Railroad is based upon and enforced by collective bargaining contracts or agreements, sometimes called schedules, made by the Order of Railway Conductors as a collective bargaining agency for the craft of conductors, and the management of the C. St. P. M. & O. Railroad, and pertains only to rights of the craft of conductors on the C. St. P. M. & O. Railroad.

A conductor who has seniority on the C. & N. W. Ry. Co. has no seniority rights whatever on the C. St. P. M. & O. Railroad, and a conductor who has seniority rights on the C. St. P. M. & O. Railroad does not have any rights whatever on the C. & N. W. Ry. Co.

This seniority is confined to what is known as seniority divisions, which seniority division is usually a portion of

the track of the railway company under the supervision of one superintendent, although not always, but the seniority is always confined to a definite portion of the railway and a seniority list is kept, maintained and posted of the men who have seniority as conductors on that seniority division. This applies to all railroads having schedules or seniority contracts. The name of a conductor appears, therefore, only on one railway seniority list, and not on the lists of two railways.

What has hereinbefore been said in reference to seniority of men of the craft of conductors is equally true of the craft of brakemen, most of whom belong to the Brotherhood of Railroad Trainmen. The plaintiffs in this case who belong to the craft of conductors are many of them [fol. 43] members of the Order of Railway Conductors of America, and hold seniority in what is commonly called the Nebraska or Eastern Division of the C. & N. W. Ry. Co., and the same is true with brakemen so far as holding seniority is concerned.

This controversy constitutes a claim by members of this Nebraska or Eastern Division of the craft of conductors and of the craft of brakemen against George Kimball, who holds seniority on the Sioux City Division of the C&NW Ry. Co. as conductor and also as brakeman, the said George Kimball being made a defendant as the representative of said Division, or, as the plaintiffs state in Paragraph 8 of their petition, "Plaintiffs further state that the controversy arises over the division of seniority rights between the Nebraska Division, to which plaintiffs belong, and the Sioux City Division, to which the defendant George Kimball belongs, over the Northwestern Railroad from Omaha, Nebraska to Sioux City, Iowa."

Affiant further states that as freight is transported from Sioux City, Iowa to Omaha, Nebraska, the same passes over the C&NW Ry. lines from Sioux City to California Junction, and from California Junction to Blair, over the C&NW tracks, and from Blair to Omaha on the CStPM&O tracks; that in transporting freight from Omaha to Sioux City it passes over the railread from Omaha to Blair on the rails of the CStPM&O, and from Blair to California Junction on the C&NW Ry. tracks, and from California Junction to Sioux City on the tracks of the C&NW Ry. This has been the case during the six years

and more last past and is the case now. The plaintiffs, as employees of the C&NW Ry. Co., have no seniority rights whatever over the tracks of the CStPM&O between Blair and Omaha.

For six years and more freight trains have been operated between Omaha, Nebraska over the CStPM&O to Blair, Nebraska, from and over the tracks of the C&NW to California Junction, and on to Sioux City, and vice versa, because of the unfavorable grades, curves and distances on the CStPM&O between Blair and Sioux City. For six years and more the employees of the CStPM&O have shared in the operation of trains from Omaha, Nebraska to [fol. 44] Sioux City, Iowa through Blair and California Junction. This sharing is based on a ratio according to the number of miles that are run on each of the two railroads between Omaha and Sioux City via Blair and California Junction.

Prior to August 1, 1926 these trains were operated from Sioux City to Missouri Valley, to Council Bluffs and over the Illinois Central Railroad to Omaha. A part of this service was rendered by the employees of the CStPM&O.

On August 1, 1926 the employees of the CStPM&O ceased rendering any service on that routing. The present system of routing and operation went into effect May 1, 1930, and has continued so ever since.

Prior to August 14, 1930 a controversy arose in which the CStPM&O craft of conductor- and craft of brakemen claimed the right to man some of the trains between Omaha and Sioux City. A hearing was held about August 14, 1930, and on August 19, 1930 the chief executives of the two labor organizations, to-wit, the Order of Railway Conductors of America and the Brotherhood of Railroad Trainmen, rendered a decision, by which decision it was held that this service from Omaha to Sioux City via Blair and California Junction constituted inter-railroad service, and that the conductors and brakemen on each of the two railroads should be given a proportionate share of the work in that service. The said service was then apportioned between the employees of the CStPM&O and the employees of the C&NW Ry., and the said service has been so apportioned and manned ever since. In said apportionment, the miles of track from Omaha to Blair are credited to the men on the CStPM&O, and the miles of

track from Blair, Nebraska to Sioux City, Iowa to the men on the C&NW Ry.

That decision, signed by Mr. Curtis, the then president of the Order of Railway Conductors, and Mr. Whitney, the then president of the Brotherhood of Railroad Trainmen, in effect decided that the employees of the C&NW Ry. Co., regardless of all past history, had no seniority rights of any kind or character on the CStPM&O tracks between Blair and Omaha, Nebraska. This decision was never ap- [fol. 45] pealed from by the Order of Railway Conductors or the members of the craft.

The members of the Brotherhood of Railroad Trainmen filed an appeal, and a final decision was procured from the Board of Directors of the Brotherhood of Railroad Trainmen, and afterwards from the Board of Appeals of the Brotherhood of Railroad Trainmen, both of which sustained the rulings of Mr. Whitney, the then president of the Brotherhood of Railroad Trainmen, thus sustaining the said ruling of the chief executives, the president of the Order of Railway Conductors, and the president of the Brotherhood of Railroad Trainmen.

This decision of the executives became binding and effective as to all conductors and [brakeman] on the C&NW Ry., and the only trackage involved in the present suit is that between Blair, Nebraska and California Junction in Iowa, which constitutes trackage of approximately seven and one-half (7½) to eight (8) miles in length.

The rates of pay for conductors during the time involved up to October 1, 1937 was six and fifty-six hundredths cents (6.56¢) per mile. On October 1, 1937 forty-four hundredths cents (0.44¢) per mile was added as compensation, so that from October 1, 1937 to the present time the compensation to conductors over said mileage was seven cents (7¢) per mile. Consequently, if any one of the conductors plaintiffs in this case had operated a train over said seven and one-half (7½) to eight (8) miles from Blair to California Junction every day for the last six years and received therefor the maximum of seven cents (7¢) per mile, his total income from that source would be Twelve Hundred Twenty-six Dollars Forty Cents ($1,226.40), and had a brakeman run over said seven and one-half (7½) to eight (8) miles every day during the six years last past, his total income from that service would be Nine Hundred Seventy-nine Dollars Thirty-seven cents ($979.37),

the brakeman's rate being five and fifteen hundredths cents (5.15¢) per mile for the period May 6, 1934 to October 1, 1937, and five and fifty-nine hundredths cents (5.59¢) per mile from October 1, 1937 to date.

It follows that no one of the plaintiffs in this case can possibly have a claim against Kimball or any other mem- [fol. 46] ber of the Sioux City Division, or the Sioux City Division as a whole, for more than Twelve Hundred Twenty-six Dollars Forty Cents ($1,226.40), and no brakeman can possibly have a claim against Kimball or any other Sioux City Division man, or all the brakemen of the Sioux City Division, of more than Nine Hundred Seventy Nine Dollars Thirty-seven Cents ($979.37).

Affiant does not hereby intend to state that any amount is due any one of these plaintiffs, but only states that if any amount is due any one of said plaintiffs, it cannot equal Three Thousand Dollars ($3,000) exclusive of interest and costs.

F. H. Nemitz.

Subscribed and sworn to before me this 21st day of May, A. D., 1940. S. M. Hoffner, Notary Public in and for Linn County, Iowa. (Seal.)

EXHIBIT "B" TO MOTION

(Affidavit of O. G. Jones)

STATE OF ILLINOIS,
County of Cook, ss:

I, O. G. Jones, being first duly sworn, depose and say that I live at Onawa, Iowa, but my place of business is at 53 West Jackson Blvd., Chicago, Illinois, where I am general chairman on the Chicago & Northwestern Railway System for the Brotherhood of Railroad Trainmen.

I began railroading in September, 1900 as a brakeman on the Sioux City Division of the Chicago & North Western Railway Company and its branches. I was promoted in August, 1906 to a conductor, and acted as brakeman and conductor for about five years on the Sioux City Division of the Chicago & North Western Railway Company (hereinafter, for brevity, called C&NW Railway Co.).

After 1911 I became a regular assigned conductor in freight and passenger service on the Sioux City Division of the C&NW Railway Co., until August 11, 1939, at which [fol. 47] time I was elected General Chairman for the Brotherhood of Railroad Trainmen (hereinafter, for brevity, called the B. of R. T.) on the C&NW Railway. I retained my seniority as brakeman and conductor on the Sioux City Division of the C&NW Railway Co.

I was local chairman for the B. of R. T. on the said Sioux City Division from 1914 to 1939, when I was elected General Chairman. I was secretary of the General Committee of the B. of R. T. on the C&NW Railway from 1926 to 1939.

I am thoroughly familiar with the said Sioux City Division of the C&NW Railway Co., as I have worked there in various capacities as above stated for many years. I am also more or less familiar with what is sometimes called the Eastern Division, which in reality, is now the Nebraska Division of the C&NW Railway Company, which includes the trackage from Missouri Valley, Iowa to Long Pine, Nebraska, through California Junction and Blair, from Norfolk, Nebraska to Wood, South Dakota, from North Omaha, Nebraska to Fremont, Nebraska, from Fremont, Nebraska to Hastings, Nebraska from Linwood, Nebraska, to Superior, Nebraska, and from Fremont, Nebraska to Lincoln, Nebraska.

I have read the petition filed by the plaintiffs in the suit entitled Barney E. Gaskill, et al., Plaintiffs, vs. Charles P. Megan, Trustee for the Chicago & North Western Railway Company, et al., in the Federal Court in Omaha, Nebraska, and by reason of my service on the C&NW Railway Co. and the Sioux City Division thereof for the years as above set forth, and by reason of being local chairman and secretary of the General Committee for the C&NW Railway System, I became thoroughly familiar with the various claims and disputes and controversies which arose between the Nebraska Division, formerly known as the Eastern Division, and the Sioux City Division of the C&NW Railway Co., particularly as these controversies arose between the brakemen of the two divisions. In the capacities above stated I became thoroughly familiar with all the various trains that were operated on the Sioux City Division and the manner in which said trains were routed from time to time. The grades and

[fol. 48] curves and distances from Omaha to Sioux City by way of Blair and the west side of the Missouri River are very unfavorable as compared with the grades and curves and distances from Omaha to Sioux City by way of Blair, California Junction and Sioux City, and vice versa.

For a period of years from about 1925 to 1930 business between Omaha and Sioux City was routed from North Omaha to Council Bluffs, over the Illinois Central bridge, from Council Bluffs to Missouri Valley, and from Missouri Valley to Sioux City, and vice versa. About 1930 this operation was changed so that the business was run from North Omaha to Blair, to California Junction, to Sioux City, and vice versa.

During all of this time there were in existence the two separate and distinct railroads, the one the C&NW Railway Co., and the other the Chicago, St. Paul, Minneapolis & Omaha (hereinafter, for brevity, called the CStPM&O). While the C&NW Railway has, during the years above specified, owned some of the stock of the CStPM&O the two railroads were operated as entirely distinct and separate railroads with separate management and separate finances. During said years each railroad had its own schedules with the union employees.

The miles of trackage between Blair and California Junction are 7.5, the miles of trackage from California Junction to Missouri Valley are 5.9.

The term "seniority" as used in this and similar cases, and as applied to railroad operation, means age in service in a particular craft, and as applied to the craft of brakeman it means the date when a brakeman began service as a brakeman on the C&NW or began service on the CStPM&O Railroad; and as applied to a conductor it means the date when he was promoted or began service on the C&NW Railway Co. as a conductor, or was promoted or began service as a conductor on the CStPM&O. No conductor and no brakeman has any seniority on more than one railroad at a time.

Seniority or seniority rights, as they are sometimes called, are limited absolutely to a seniority division, which is a definitely defined portion of a railroad. Seniority is [fol. 49] based upon and enforced entirely by collective bargaining contracts or schedules made between craft unions and railway companies. That is to say, seniority on the C&NW Railway Co. for a brakeman is based on a collective

bargaining contract or schedule made between the B. of R. T. and the management of the C&NW Railway Co., and pertains only to rights and remedies on the property operated by the C&NW.

Seniority on the CStPM&O is based upon and enforced by collective bargaining contracts or agreements, sometimes called schedules, made between the B. of R. T., as a collective bargaining agency for the craft of brakemen, and the management of the CStPM&O, and pertains only to rights of the brakemen on the CStPM&O. The same is true in reference to the craft of conductors on each of said railroads.

The name of a brakeman appears on only one railway seniority list at a time, and not on the lists of two railroads. The name of a conductor appears only on one railway seniority list, and not on the seniority list of two railroads.

Some of the plaintiffs in this case are members of the B. of R. T., and some of the plaintiffs in this case are members of the Order of Railway Conductors, and some of the plaintiffs do not belong to either organization but are working as members of either the craft of brakemen or the craft of conductors.

During all of the times involved in this litigation the C&NW Railway Co. owned and operated a line of railway extending, among other places, west from Chicago through Missouri Valley, California Junction, Blair and Fremont. At the same time the CStPM&O owned a line of railway running, among other places, from Omaha, Nebraska through Blair, along the west side of the Missouri River to a bridge across the Missouri River near Sioux City, and to Sioux City and on northeast. Thus these two railroads crossed each other at Blair, Nebraska.

For many years controversies of various kinds have existed between the brakemen and conductors on the Eastern, or Nebraska Division of the C&NW and the brakemen [fol. 50] and conductors on the Sioux City Division of the C&NW, and the brakemen and conductors on the CStPM&O from Omaha to Sioux City. For a number of years the Nebraska Division brakemen and conductors have been claiming certain rights on that portion of the CStPM&O from North Omaha to Blair, Nebraska.

The controversy in this case constitutes a claim by members of the Nebraska Division of the craft of brake-

men and the craft of conductors, against George Kimball of Sioux City, Iowa, who holds seniority in the Sioux City Division of the C&NW Railway Co. as a brakeman and also as a conductor, the said George Kimball being made a defendant as the representative of said division, or, as the plaintiffs state in Paragraph 8 of their petition, "Plaintiffs further state that the controversy arises over the division of seniority rights between the Nebraska Division, to which plaintiffs belong, and the Sioux City Division, to which the defendant George Kimball belongs over the Northwestern Railroad from Omaha, Nebraska to Sioux City, Iowa."

The plaintiffs, as employees of the C&NW Railway Co., have no seniority rights whatever over the tracks of the CStPM&O Railroad between Blair and Omaha.

For six years and more freight trains have been operated between Omaha, Nebraska over the CStPM&O Railroad to Blair, Nebraska, and from Blair, Nebraska over the tracks of the C&NW to California Junction, and on to Sioux City, and vice versa. A majority of the business which normally would be handled from Omaha through Blair and Sioux City over the CStPM&O is now, and has been handled fro six years or more, over the CStPM&O from Omaha to Blair, and over the C&NW from Blair to California Junction, from California Junction to Sioux City, and vice versa.

For six years and more the employees of the CStPM&O have shared in the operation of trains from Omaha, Nebraska to Sioux City, Iowa through Blair and California Junction. This sharing of trains is based on a ratio according to the number of miles that are run on each of the two railroads between Omaha and Sioux City via Blair and California Junction.

[fol. 51] Prior to August 1, 1926 these trains were operated from Sioux City to Missouri Valley to Council Bluffs and over the Illinois Central Railroad to Omaha. A part of this service was rendered by the employees of the CStPM&O.

On or about August 1, 1926 the employees of the CStPM&O ceased rendering any service on that routing. The present system of routing and operation went into effect May 1, 1930 and has continued so ever since.

Prior to August 14, 1930 a controversy arose in which the CStPM&O craft of brakemen and craft of conductors

claimed the right to man some of the trains between Omaha and Sioux City through Blair and California Junction. A hearing was held about August 14, 1930, and on August 19, 1930 the chief executives of the two labor organizations, to-wit, the B. of R. T. and the Order of Railway Conductors, rendered a decision, by which decision it was held that this service from Omaha to Sioux City via Blair and California Junction constituted interrailroad service, and that the brakemen and conductors on each of the two railroads should be given a proportionate share of the work in that service, that said service was then apportioned between the employees of the CStPM&O and the employees of the C&NW Railway Co., and the said service has been so apportioned and manned ever since.

In said apportionment the miles of track from Omaha to Blair owned by the CStPM&O are credited to the men on the CStPM&O, and the miles of track from Blair, Nebraska to Sioux City, Iowa to the men on the C&NW. In this apportionment there are also 1.7 miles of trackage between Dace and 22nd Streets in Sioux City, Iowa accredited to the CStPM&O men.

That decision, signed by Mr. Whitney, the then and now president of the B. of R. T., and Mr. Curtis, the then president of the Order of Railway Conductors, in effect definitely decided that the employees of the C&NW Railway, regardless of all past history, had no seniority rights of any kind or character on the CStPM&O tracks between Blair and Omaha, Nebraska. This decision was never appealed from by the Order of Railway Conductors or the members of the craft of conductors on the Nebraska Divi- [fol. 52] sion. The members of the B. of R. T. filed an appeal, and a final decision was procured from the Board of Directors of the B. of R. T., and afterwards from the Board of Appeals of the B. of R. T., both of which boards sustained the rulings of Mr. Whitney, the then and now president of the B. of R. T., thus sustaining the said ruling of the chief executives, the president of the B. of R. T. and the president of the Order of Railway Conductors.

This decision of the executives, as above stated, became binding and effective as to all brakemen and conductors on the C&NW, and the only trackage involved in the present suit as brought pertains to that trackage between Blair, Nebraska and California Junction in Iowa, which constitutes trackage of approximately 7.5 miles in length.

The rates of pay for conductors during the times involved up to October 1, 1937 was 6.56 cents per mile. On October 1, 1937 .44 cents per mile was added as compensation, so that from October 1, 1937 to the present time the compensation to conductors over said mileage was 7 cents per mile.

Consequently, if any one of the conductors plaintiffs in this case had operated a train over said 7.5 miles from Blair to California Junction every day for the last six years, and received therefor the maximum of 7 cents per mile, his total income from that source would be $1,149.75, and if he made a round trip over said 7.5 miles every day for six years, the maximum he could possibly make would be $2,299.50; and had a brakeman run over said 7.5 miles every day during the six years last past, his total income from that service would be $918.16, the brakeman's rate being 5.15 cents per mile for the period May 6, 1934 to October 1, 1937, and 5.59 cents per mile from October 1, 1937 to date, and if he made a round trip over said 7.5 miles every day for six years, the maximum he could possibly make would be $1,836.32.

It follows that no one of the plaintiffs conductors in this case can possibly have a claim against Kimball or any other members of the Sioux City Division, or the Sioux City Division as a whole, or any one else, including the C&NW Railway Co. or its trustee, for more than $2,299.50, [fol. 53] and no brakeman can possibly have a claim against Kimball or any other Sioux City Division man, or all the brakemen of the Sioux City Division, or any one else on the Sioux City Division, or the C&NW Railway Co., or its trustee, of more than $1,836.32. These maximums show what the earnings would be if the maximum rate were given for the entire time, and if the individual made not only a trip but a round trip over this area every day for the six years involved.

When it is considered that there are approximately 40 plaintiffs and that in maximum operations there would be not more than four trains a day each way, and a part of the time only three trains a day, having one conductor and two brakemen, over this territory, it is apparent and conclusive that no one of the plaintiffs in this case can possibly have a claim against any one or the railroad company, or its trustee, for the sum of $3,000 exclusive of

interest and costs, upon the claims made by the plaintiffs in this suit.

Affiant is informed and believes that out of the 40 odd plaintiffs, 10 belong to the Order of Railway Conductors and 18 belong to the Brotherhood of Railroad Trainmen.

Those of us who are familiar with the situation know that only a small number of these plaintiffs could work between Blair and California Junction at one time, and consequently their said claims would be proportionately decreased. Moreover, it is a matter of observation and experience that men do not work steadily every day for a period of six years, but take lay-offs and vacations and are out of work for periods of time. This consideration would also very materially decrease the claims of the plaintiffs.

For the six years last past and more the said Nebraska Division has operated trains between Missouri Valley, Fremont, and beyond west, and between Missouri Valley and Omaha over the Sioux City Division between California Junction and Missouri Valley, a distance of 5.9 miles. During practically all of this period of time the said Nebraska Division has operated three regular trains in either direction six days per week.

[fol. 54] If there is any liability on the part of the Sioux City Division to the Nebraska Division for the use of the trackage between Blair and California Junction, then by the same token there is a similar liability of the Nebraska Division to the Sioux City Division for the use of said trackage between California Junction and Missouri Valley.

Using this to offset the mileage the Sioux City Division operated during the same period over the Nebraska Division between California Junction and Blair, there would be a relatively small amount of mileage or time due the Nebraska Division.

Affiant does not hereby intend to state that any amount is due any one of these plaintiffs, but only states that if any amount is due any one of said plaintiffs, it cannot equal $3,000 exclusive of interests and costs.

O. G. Jones.

Subscribed and sworn to before me this 29th day of May, A. D., 1940. John Mueller, Notary Public in and for Cook County, Illinois. (Seal.)

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

AFFIDAVIT OF G. F. STEPHENS IN SUPPORT OF MOTION TO DISMISS—Filed June 4, 1940

STATE OF ILLINOIS,
Cook County, ss:

I, G. F. Stephens, do solemnly swear that I am Director of Personnel of Chicago and North Western Railway Company, now being operated under Charles M. Thomson, Trustee, and have been Assistant Director of Personnel [fol. 55] for a number of years last past; that I am thoroughly familiar with all phases of the controversy involved in this suit; tha I have read the affidavit of Mr. F. H. Nemitz filed in this cause on behalf of the Railroad Brotherhoods, defendants herein; that the facts stated in said affidavit on Pages 3, 4, 5, 6, 7, 8, 9 and 10 thereof are true of my own knowledge.

I further state that based upon the history of said controversy and the facts stated in the affidavit of Mr. Nemitz, it would be impossible for any of the plaintiffs in this suit to have earned within four or five years of the commencement of the suit as much as $3,000.00 each on account of runs denied to any of plaintiffs who are members of the Nebraska Division of Chicago and North Western Railway Company over the Nebraska Division thereof, which runs may have been assigned to members of the Sioux City Division of Chicago and North Western Railway Company, over the territory between Blair, Nebraska, and California Junction, Iowa, and that in my opinion the amounts of such deprived earnings, if any, could not exceed the amounts stated in the first paragraph of Page 11 of the affidavit of Mr. Nemitz.

I further say, therefore, based upon my knowledge of the controversy and my knowledge of the facts involved, that no plaintiff in this suit has any legitimate claim to as much as $3,000.00, even if his contentions should be upheld as to the division of runs accruing to him within five years

before the suit was filed, regardless of whether such claims be litigated in the Federal Court or the State Courts.

G. F. Stephens.

Subscribed and sworn to before me this 29th day of May, 1940. Margaret C. Carmody, Notary Public. (Seal.)

[File endorsement omitted.]

[fol. 56] IN THE DISTRICT COURT OF THE UNITED STATES

No. 42

Civil Action

BARNEY E. GASKILL, et al., Plaintiffs,

vs.

CHARLES P. MEGAN, Trustee for the Chicago and Northwestern Railway Company, a corporation, et al., Defendants

FINDINGS OF THE COURT AND JUDGMENT DISMISSING CASE—September 21, 1940

This matter came on to be heard the 7th day of September, 1940, upon the portions of the various motions of the various defendants to dismiss the petition in this case and to dismiss the above-entitled cause for want of jurisdiction on the ground that the petition fails to allege facts sufficient to establish that the requisite jurisdictional amount of $3,000, exclusive of interest and costs, is in controversy as required by law, and for the reason that, the jurisdiction of the Court having been properly challenged and the Court having required each plaintiff to establish that the requisite jurisdictional amount is involved as to his demand, the affidavits as filed by certain of said plaintiffs, as to the amount of their respective demands involved herein against the defendants, are unsupported conclusions which are insufficient to establish jurisdiction in the Court when so properly challenged and because said conclusions are shown to be untrue by defendants' evidence submitted

dehors the petition and that the plaintiffs' evidence is insufficient to enable the Court to assume jurisdiction in this case; and upon the motions of certain of said defendants to strike the said affidavits of plaintiffs as filed.

The Court having heretofore announced that in his opinion the various claims of the plaintiffs were separable and that the case was not such a class action so as, within Rule 23 of the Rules of Civil Procedure or otherwise, to permit the aggregating of the claims of all plaintiffs together in order to give the jurisdictional amount required by law, and the Court having orally, before passing on any of the other grounds for dismissal raised by the defendants' motions to dismiss, ruled that each plaintiff would be required, by whatever means or evidence they saw fit, [fol. 57] to show that each such plaintiff's claim involved the requisite jurisdictional amount, and that the petition would be dismissed as to each plaintiff whom the Court would find had failed to make such a satisfactory showing; and ten of the plaintiffs having each individually filed an affidavit in which the existence of the requisite jurisdictional amount as to such respective affiant was stated substantially as alleged originally in Paragraph 13 of the petition, but the plain iffs, having continued to contend as they did throughout all these proceedings that this case was a class action under Rule 23 of said Rules of Civil Procedure and that the rights of the various plaintiffs herein, and of the class represented by the defendant George Kimball, could be determined only in one proceeding in which all were made parties; and the Court having offered to allow all the plaintiffs to produce additional evidence to show that the jurisdictional amount was in controversy as to each individual plaintiff, but the plaintiffs in open Court having elected to stand on the proposition as stated by them "that this is a class action within Rule 23 above mentioned, and that the rights of the plaintiffs are so interlocked and interwoven that the rights of one cannot be determined without the others being parties thereto, and therefore, that the aggregate amounts involved include not only what has already been earned by each party, but what they might earn in the future should be considered in determining the jurisdictional amount."

The Court in order to clarify the issues, finds as follows:

(1) That the defendants have properly challenged the existence of the requisite jurisdictional amount so as to

raise the question of the Court's jurisdiction to hear and determine this case;

(2) That the claims of the plaintiffs are separable and that this action is not such a class action so as, under Rule 23 of said Rules of Civil Procedure, or otherwise, to allow or permit the aggregating of the amounts of the claims of all plaintiffs in determining the existence of the requisite jurisdictional amount;

[fol. 58] (3) That no plaintiff has made a sufficient showing that the requisite jurisdictional amount is involved as to his claim; and

(4) That the evidence submitted by the defendants dehors the petition together with the allegations of the petition establish that the amount in controversy as to any one plaintiff does not amount to as much as $3,000, exclusive of interest and costs.

The Court concludes as a matter of law, therefore, that the Court is without jurisdiction to hear and determine the case, and that the petition should be dismissed as to all plaintiffs.

Wherefore, It Is Ordered, Adjudged and Decreed that the above-entitled cause, for the reasons above set forth, should be, and is hereby, dismissed as to all plaintiffs against all defendants, and that the defendants have and recover judgment respectively for their costs herein expended.

To all of which the various plaintiffs except.

Dated at Omaha, Nebraska, this 21st day of September, 1940.

By the Court, J. A. Donohoe, United States District Judge for the District of Nebraska, Omaha, Division.

OK as to form. Wymer Dressler, R. D. Neely, Attys. for C&NW Ry. Co.

J. C. Grimm, W. C. Fraser, W. M. McFarland, Attys. for George Kimball, O. R. C. and B. R. T.

O. K. S. L. Winters, Geo. Burger, Attys. for Plaintiffs.

[File endorsement omitted.]

[fol. 59] Cost Bond on appeal for $250.00, filed Oct. 21, 1940, omitted in printing.

[fol. 60] Subscribed in my presence and sworn to before me this 19th day of October, 1940. George P. Burger, Notary Public. (Seal.)

Commission expires on the 6th day of March, 1945.

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS—Filed Oct. 21, 1940

Notice is hereby given that Barney E. Gaskill, et al., Plaintiffs, hereby appeal to the Circuit Court of Appeals for the Eighth (8th) Circuit, from the Findings of the Court, and Judgment Dismissing Case by the District Court of the United States, Honorable J. A. Donohoe, District Judge, dated September 21, 1940.

Dated at Omaha, Nebraska, this 14th day of October, 1940.

Barney E. Gaskill, et al., Plaintiffs, by S. L. Winters & George Burger, Their Attorneys.

[File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

DESIGNATION OF PORTIONS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN THE RECORD ON APPEAL—Filed Oct. 21, 1940

[fol. 61] Comes now the appellants, Barney E. Gaskill, et al., and designates the following portions of the record, proceedings and evidence to be contained in the record on appeal:

1. The original Petition filed.

2. The various Motions of the defendants to dismiss the case for want of jurisdiction, on the ground that the petition fails to allege facts sufficient to establish requisite jurisdictional amount.

3. All the affidavits filed on behalf of plaintiffs, and also all affidavits filed on behalf of the defendants in resisting the motion and in support of the motion to dismiss.

4. The Findings and Judgment of the Court Dismissing the case signed by the Honorable J. A. Donohoe, United States District Judge, September 21, 1940.

5. Notice of Appeal.

6. Bond for Costs on Appeal.

7. Leave off all headings and verifications.

Barney E. Gaskill, et al., Plaintiffs, by S. L. Winters & Geo. Burger, Their Attorneys.

[File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

CONCISE STATEMENT OF POINTS THAT APPELLANTS INTEND TO RELY ON—Filed October 21, 1940

1. The appellants, Barney E. Gaskill, et al., contend that under the record in this case, that the Court erred in dismissing the petition upon portions of the various motions of the various defendants for want of jurisdiction, on the [fol. 62] ground that the petition fails to allege facts sufficient to establish that the requisite jurisdictional amount of $3,000.00, exclusive of interest and costs, is in controversy as required by law.

2. Appellants contend that this is a class action within Rule 23 of the Rules of Civil Procedure for the District Courts of the United States adopted by the Supreme Court of the United States, permitting class actions to be brought

where there are several plaintiffs, and there is a common question of law or fact effecting the several rights and a common relief is sought, so as to permit the aggregating of the claims of all plaintiffs together in order to give the jurisdictional amount required by law.

3. Appellants contend that their rights are so interwoven and so connected that the rights of one cannot be determined without determining the relative rights of the other plaintiffs.

4. Appellants contend that their seniority rights are property rights which cannot be taken away from them without their consent, either by the union or by the defendant trustee representing the railroad company by whom they were employed, nor can the railroad itself deprive them of such right, and that the aggregate amounts involved includes not only what has already been earned, but what they might earn in the future, should be considered in determining a jurisdictional amount.

5. Appellants contend that the affidavits produced by the appellants, and the counter-affidavits produced by the defendants show that more than $3000.00 was involved in this law suit on the theory that this was a class action under Rule 23 as above described, and that their rights were so inseparable and interwoven, and that each plaintiff was a necessary party to determine the rights of the other plaintiffs and the other defendants, so they have the right to join in a single action to have their various rights determined and adjudicated as among themselves and as against the defendant union employees who took their places in one action. Therefore, the jurisdictional amount was clearly shown, and the Court erred in dismissing this proceeding on the ground that it was without jurisdiction to [fol. 63] hear and determine the cases for want of jurisdictional amount.

Barney E. Gaskill, et al., Plaintiffs, by S. L. Winters, Geo. Burger, Their Attorneys.

[File endorsement omitted.]

Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 64-65] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

(Appearances of Counsel omitted in Printing.)

[fol. 66] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

MOTION OF APPELLEES GEORGE KIMBALL, ORDER OF RAILWAY CONDUCTORS, AND BROTHERHOOD OF RAILROAD TRAINMEN TO DISMISS APPEAL OR AFFIRM, BRIEF, NOTICE, AND ACKNOWLEDGEMENT OF SERVICE—Filed December 10, 1940

Come now George Kimball, Order of Railway Conductors, and Brotherhood of Railroad Trainmen, three of the appellees herein, by J. M. Grimm, W. C. Fraser, and W. M. McFarland, their counsel, and show to this Court that notice of appeal to this Court dated October 14, 1940 was filed October 21, 1940; that a copy of the transcript of the record on appeal has not been received by these appellees, and information as to the contents thereof was obtained from the Clerk of this Court; that said transcript shows appellants filed their designation of portions of the record on October 21, 1940, but that the complete record was not thereby designated, as appears on the face of such designation, and that such designation was not served on these appellees or their counsel, and that these appellees were thereby deprived of their right to designate additional parts of the record; that if any designation of points to be relied on upon appeal was filed, no copy of any such designation or statement of points has been served upon these appellees or their counsel, and that no such statement or designation of points to be relied upon was filed within five (5) days after said transcript was filed in this Court.

Wherefore, these appellees move, if the same has not been duly done, that the case be docketed, and that this Court dismiss with costs the appeal taken herein to this Court by the appellants, upon the following grounds:

1. Appellants failed to serve their designation of the record on these appellees, in violation of Rule 75 (a) of the Rules of Civil Procedure for the District Courts of the [fol. 67] United States, (28 U. S. C. A., following Sec.

723 c), and in violation of Rule 25 (1) of the Rules of the Eighth Circuit Court of Appeals, which became effective September 16, 1938.

2. Appellants did not designate the entire record, and failed to serve a statement of points upon which they intended to rely on appeal, as required by Rule 75 (d) of the said Rules of Civil Procedure, and in violation of Rule 25 (4) of the said Rules of this Court.

3. That if any designation or statement of points to be relied on upon appeal was filed in the District Court, that the same was invalid for failure to serve the same, and was therefore improperly included in the transcript of the record on appeal to this Court.

4. That, although the notice of appeal was dated October 14, 1940, the record was not filed and the case not docketed in this Court until November 26, 1940, and hence not within forty (40) days from the date of the notice of appeal, in violation of Rule 73 (g) of said Rules of Civil Procedure, and Rule 27 of said Rules of this Court.

5. Although appellants did not serve, or to the knowledge of these appellees filed, or validly include in the transcript as filed, any statement of points to be relied on upon appeal to this Court, they failed to file any statement of such points in this Court which separately and particularly set out each error asserted and intended to be urged within five (5) days after filing said transcript in this Court, all in violation of Rule 24 (1) of said Rules of this Court.

6. That this Court has no jurisdiction as an appellate Court to hear and determine said appeal, for the reason that the same has not been perfected in compliance with the [fol. 68] said Rules of this Court or with the Rules of Civil Procedure.

In the alternative, said appellees move this Court to affirm the judgment from which the appeal in the above-entitled cause purports to have been taken, on the ground that it is manifest from the record that the lower Court was without jurisdiction to hear and determine any cause of action asserted by the appellants, and that this Court is therefore without appellate jurisdiction in the premises, other than to affirm the action and judgment of the lower Court.

Dated at Omaha, Nebraska, this 5th day of December, 1940.

J. M. Grimm, W. C. Fraser, W. M. McFarland, Attorneys for Appellees George Kimball, Order of Railway Conductors, and Brotherhood of Railroad Trainmen.

Brief

I.

Necessity for Dismissal of Appeal for Appellants' Failure to Comply with Court Rules Governing the Same.

Leimer v. *State Mutual Life Assurance Company of Worcester, Mass.*, 107 F. (2d) 1003, decided by the Eighth Circuit Court of Appeals, December 7, 1939, is squarely in point. The citation of additional authority to this Court, which has already considered and decided the exact questions herein involved, seems unnecessary.

[fol. 69]

II

The District Court Was Without Jurisdiction to Hear and Determine Any Cause of Action Asserted by Appellants Because of Lack of Jurisdictional Amount as to Any Appellant.

The facts as pleaded and as disclosed by the evidence on the question of whether the jurisdictional amount is involved as to any appellant, taken in the manner selected by the appellants, bring the case within the rule of *Clark* v. *Gray, et al.*, 306 U. S. 583, 83 L. Ed. 1001, and not within the rule of *Gibbs* v. *Buck, et al.*, 307 U. S. 66, 83 L. Ed. 1111.

The lower Court rightly held that the appellees, by their various motions and answers, had properly traversed the conclusion as pleaded that each appellant had a claim in excess of $3,000, as alleged in Paragraph Thirteen of their petition. By its ruling requiring the appellants to establish such conclusion as alleged, the lower Court properly placed the burden on the appellants to establish that the jurisdictional amount was involved as to each appellant. This was in conformity with the weight of authority, and

upon appellants' failure to sustain this burden the lower Court had no alternative but to sustain the motions to dismiss and enter judgment for the appellees.

McNutt v. *General Motors Acc. Corp.*, 298 U. S. 178, 80 L. Ed. 1135;

Kvos, Inc. v. *Associated Press*, 299 U. S. 269, 81 L. Ed. 183;

(See 81 L. Ed. pp. 197 and 205, for Annotation);
Town of Lantana, Fla. v. *Hopper*, 102 F. (2d) 118.

[fol. 70] Respectfully submitted, J. M. Grimm, W. C. Fraser, W. M. McFarland, Attorneys for Appellees George Kimball, Order of Railway Conductors, and Brotherhood of Railroad Trainmen.

NOTICE

To S. L. Winters and George P. Burger, Attorneys for Appellants, and Wymer Dressler, Attorney for Appellee Charles P. Megan, Trustee for the Chicago & Northwestern Railway Company, et al.:

Please take notice that the undersigned appellees in the above-entitled cause will move before the United States Circuit Court of Appeals for the Eighth Judicial Circuit, at the Court Room in the — Building in the City of St. Louis, State of Missouri, for an order dismissing the appeal in the above-entitled cause, and for such further relief as to the Court may seem fit and proper.

Such motion will be submitted to the said Court for consideration by the Clerk of that Court at the time and in the manner provided by the rules of that Court.

Attached is a copy of said motion and of brief in support thereof, which, together with this notice, are herewith served upon you.

Dated at Omaha, Nebraska, this 5th day of December, 1940.

[fol. 71] J. M. Grimm, W. C. Fraser, W. M. McFarland, Attorneys for Appellees George Kimball, Order of Railway Conductors, and Brotherhood of Railroad Trainmen.

Service of the attached motion, notice and brief is accepted, and receipt of copies thereof hereby accepted this 5th day of December, 1940.

S. L. Winters, George P. Burger, Attorneys for Appellants. Wymer Dressler, R. D. Neely, Attorneys for Appellee Charles P. Megan, Trustee for the Chicago & Northwestern Railway Company.

[File endorsement omitted.]

In United States Circuit Court of Appeals

Order Denying Motion of Certain Appellees to Dismiss Appeal and Passing Motion to Affirm, etc.—December 21, 1940

This cause came on to be heard on the motion of appellees George Kimball, Order of Railway Conductors, and Brotherhood of Railroad Trainmen, to dismiss the appeal or [fols. 72-73] in the alternative to affirm the judgment of the District Court appealed from, the answer thereto and briefs and memorandum of counsel.

After hearing Mr. W. M. McFarland, counsel for the movants, and Mr. S. L. Winters, counsel for appellants, It is ordered by the Court that the motion to dismiss, be, and is hereby, denied.

And it is further ordered by this Court that the motion of said movants to affirm the judgment of the District Court on the ground that said Court was without jurisdiction to hear and determine the cause and that this Court is therefore without appellate jurisdiction is passed for consideration at the time of the hearing of the merits of this appeal.

December 21, 1940.

(Orders of Argument and Submission omitted in printing)

[fol. 74] In United States Circuit Court of Appeals, Eighth Circuit

[Title omitted]

April 22, 1941

Mr. S. L. Winters (Mr. George Burger was with him on the brief) for Appellants.

Mr. Wymer Dressler (Mr. Robert D. Neely and Mr. W. T.

Faricy were with him on the brief) for appellee, Charles M. Thomson, Trustee.

Mr. W. M. McFarland (Mr. J. M. Grimm and Mr. W. C. Fraser were with him on the brief) for appellees, George Kimball et al.

[fol. 75] Before Woodrough, Johnsen and Van Valkenburgh, Circuit Judges

OPINION

WOODROUGH, Circuit Judge, delivered the opinion of the court.

This is a civil action against the Trustee in Reorganization of the Chicago & Northwestern Railway Company and others, brought by forty-one conductors and trainmen belonging to a class or group of the Trustee's employees known as the Nebraska Division of Trainmen. They allege in their petition that by virtue of certain written contracts entered into by the railroad and now obligatory upon the Trustee, the members of said Nebraska Division of Trainmen were accorded the right to perform the work of conductors and trainmen upon certain stretches or runs of the railroad between Omaha, Nebraska, and Sioux City, Iowa, but that although plaintiffs were at all times ready, willing and able to perform, the defendant has denied that the contracts accord the right to performance of the work to the members of said Nebraska Division of Trainmen or that the plaintiffs have the rights they claim, and has breached the contracts and does now and has continuously awarded the work to other persons.

It is alleged that the rights of the individual plaintiffs, members of the Nebraska Trainmen's Division, in respect to each other, are fixed by so called seniority rules by which defendant Trustee is bound, and that such individual rights are ascertainable by computation, but that the right of each is related to the right of the others, and that all of the members are necessary parties to such a determination. They seek a declaratory judgment that the defendant is now and has been obligated by the contracts to allot the said work to the members of the Nebraska Division of Trainmen, including the plaintiffs; they pray that an accounting be made of the amount and cost of the work that should have been allotted to the Nebraska Division of

[fol. 76] Trainmen members but which has been wrongfully allotted to others, and that the amount of work that each of the plaintiffs has been wrongfully deprived of be determined, and that judgment be given each of the plaintiffs for such an amount as he would have earned if his right to perform the work had not been wrongfully denied him.

A member of the Sioux City Division of the Chicago & Northwestern Trainmen was made a party defendant to the petition and subsequently an order was entered making the Brotherhood of Railroad Trainmen and Order of Railway Conductors parties defendant.

Issues were joined by the Trustee in Reorganization but all parties defendant questioned the jurisdiction of the District Court as to the amount in controversy, diversity of citizenship being conceded. The court tried out the question of the amount in controversy separately and prior to trial of the merits of the case and evidence was adduced pro and con in the form of affidavits. The court found that the claims of the plaintiffs were separable and could not be aggregated to make up the jurisdictional amount and that no plaintiff had shown the requisite amount involved as to his claim; that the evidence submitted by the defendants, considered together with the allegations of the petition, established that the amount in controversy as to any one plaintiff did not reach to the requisite sum, and the case was dismissed for want of jurisdiction. From the order of dismissal the plaintiffs have appealed.

Opinion

The only question here is whether the matter in controversy in the action exceeds the sum or value of $3,000.00, exclusive of interest and costs, so as to give the District Court jurisdiction. Jud. Code § 24 (1), 28 U. S. C. A. 41 (1). The complaint alleged that the requisite amount was involved, but the District Court adopted and followed a fair and proper procedure to determine the facts upon [fol. 77] which its jurisdiction depended,[1] and the evidence which was adduced by the parties upon the issue and con-

[1] *Gibbs* v. *Buck*, 307 U. S. 66, loc. cit. 72, 73, 74, 75. "As there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court."

sidered by the court has been properly brought up on this appeal.

The trial court was persuaded upon the showing made that the work that any one of the plaintiffs could claim to have lost up to the filing of the petition would not have amounted to $3,000.00, and that no one of the plaintiffs had a claim of loss for deprivation of work amounting to $3,000.00 up to that time, and we think the evidence supports that conclusion of the court.

But we are of the opinion that the criterion adopted for determination of the matter in controversy in the action and the value thereof was erroneous. Our conclusion is that the essential matter in controversy disclosed by the pleadings and the evidence is the right of the members of the Nebraska Division of Trainmen, identified by their membership in that group or class, to perform the work of conductors and trainmen upon the stretch or run of railroad described in the complaint. The railroad has denied the right and does now and will continue to deny the right to the Nebraska Division of Trainmen—that is, to the class or group of workmen which asserts and claims it. That is the dispute and that defines the essential matter in controversy. Under these circumstances the issue on jurisdiction is the value of the right of the Nebraska Division of Trainmen to carry on through its members the work they claim the several contracts of the railroad have allotted to the Nebraska Division of Trainmen. Although no individual plaintiff has yet lost the sum of $3,000.00 through being deprived of the claimed right to do the work, the testimony very clearly establishes that the amount involved in the controversy, as we have stated it, does greatly exceed the jurisdictional requirement. The trainmen and con- [fol. 78] ductor wages on the designated runs for the life of the contracts will greatly exceed $3,000.00.

We think that the principles that governed decision in *Gibbs* v. *Buck*, 307 U. S. 66, are applicable to this case and require us to hold that the matter in controversy—the value of the aggregate rights of all the members of the Nebraska Division of Trainmen to be allotted work while the alleged contracts continue and to recover a sum of money as damages for work heretofore wrongfully denied them—exceeds $3,000.00 in value and that the case is within federal jurisdiction. It is true the facts in *Gibbs* v. *Buck*, *supra*, may be distinguished in many respects from those here involved.

There the members of the society of composers, authors and publishers were prohibited by the Florida statute from combining in the form of such society to carry on the business of licensing their productions. Here the railroad has not prohibited the plaintiffs from membership in the Nebraska Division of Trainmen, but the reason for its refusal of the work to the plaintiffs is that another Division of Trainmen, and not the Nebraska Division, is entitled. The prohibition against doing the work is against the class and the plaintiffs constitute the class. No individual plaintiff can obtain any relief in the action until their collective right as a class is established. The common and collective right of the conductors and trainmen to recognition by the railroad of their Nebraska Division of Trainmen is fairly analogous to the common and collective right of the authors and publishers to preserve the immunity of their society from the action of the State of Florida considered in the Gibbs case. As in that case, these plaintiffs have a common and undivided interest in the matter of establishing the right of their class. The aggregate value of the work claimed by the class is therefore the criterion for jurisdiction.

The appellees cite *Clark* v. *Gray*, 306 U. S. 583; *KVOS Inc.* v. *Associated Press*, 299 U. S. 269, and *McNutt* v. *Gen-*
[fol. 79] *eral Motors Acceptance Corp.*, 298 U. S. 178, as compelling an opposite conclusion. In *Clark* v. *Gray* each of the plaintiffs was a taxpayer and each sought to enjoin a tax applicable to him and we do not find the decision that each was required to show the jurisdictional amount involved as to him to be relevant in this case. In *KVOS Inc.* v. *Associated Press* the plaintiff sought to enjoin certain wrongful conduct which threatened damage to plaintiff's business, but there was failure to prove that the threatened damage would equal $3,000.00. *McNutt* v. *General Motors Acceptance Corp.* went off on the failure of proof or findings upon the issue of fact whether or not the jurisdictional amount was involved.

None of the cases called to our attention seems to us to be contrary to our conclusion here, that the matter in controversy here is of the value of more than $3,000.00. We have found the plaintiffs' petition very difficult of analysis and have stated its intendments as we understand them, most favorably to the pleader, for the purpose of passing on the sole question of jurisdiction raised on the appeal.

We have not considered any question going to the merits of the case or the sufficiency of the pleadings.

The judgment of dismissal is reversed and the cause remanded.

[fols. 80-93] In United States Circuit Court of Appeals, Eighth Circuit

Barney E. Gaskill, et al., Appellants,

vs.

Charles M. Thomson, Trustee for Property of Chicago and Northwestern Railway Company, George Kimball and the Order of Railway Conductors and Brotherhood of Railroad Trainmen

Judgment—April 22, 1941

Appeal from the District Court of the United States for the District of Nebraska.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Nebraska, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that Barney E. Gaskill, et al., have and recover against Charles M. Thomson, Trustee for property of Chicago and Northwestern Railway Company, George Kimball and the Order of Railway Conductors and Brotherhood of Railroad Trainmen the sum of —— Dollars for their costs in this behalf expended to be collected according to law.

It is further ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court for proceedings not inconsistent with the opinion of this Court this day filed herein.

April 22, 1941.

[fol. 94] Petition for Rehearing covering 13 pages, filed May 5, 1941, omitted from this print. It was denied, and nothing more by order of May 9, 1941.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING—May 9, 1941

The petition for rehearing filed by counsel for the appellees having been considered, It is now here Ordered by this Court that the same be, and it is hereby denied.

May 9, 1941.

[fol. 95] IN UNITED STATES CIRCUIT COURT OF APPEALS

MOTION OF APPELLEES FOR STAY OF MANDATE—Filed May 15, 1941

To Honorable Joseph W. Woodrough, Arba S. Van Valkenburgh, and Harvey Johnsen, Circuit Judges of the Circuit Court of Appeals for the Eighth Circuit:

Your said petitioners respectfully present this, their application for, and move the Court to enter, an order staying and withholding the Mandate in this case, under the provisions of Section 350 of Title 28 of the United States Code, and pursuant to Rule 19 of the Rules of this Court, because it is the bona fide intention of said appellees to make proper application to the Supreme Court of the United States for writ of certiorari in this case within the next thirty (30) days.

The grounds upon which said petition for certiorari will be based are substantially as follows:

1. The decision of said Circuit Court of Appeals as to the right of a group of plaintiffs to aggregate their claims for jurisdictional purposes is in conflict with the decisions of the Circuit Court of Appeals for the Second Circuit on the same matter in the case of *Central Mexico Light & Power Co.* v. *Munch*, 116 F. (2d) 85, and *Hackner* v. *Guaranty Trust Co.*, 117 F. (2d) 95, and in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Atwood* v. *National Bank of Lima*, 115 F. (2d) 861.

2. The said decision of the Eighth Circuit Court of Appeals as to the existence of jurisdiction in the Federal District Court in an action of the class as defined in Clause (3) of Rule 23 (a) of the Federal Rules of Civil Procedure

[fol. 96] for the District Courts of the United States, by holding that the several and distinct claims of the various plaintiffs could be aggregated for jurisdictional purposes, is a decision of a Federal question in conflict with the distinction made by the two decisions of this Court rendered on the same day, namely, *Gibbs* v. *Buck*, 307 U. S. 66, 83 L. Ed. 1111, and *Clark* v. *Gray*, 306 U. S. 583, 83 L. Ed. 1001.

3. The said decision of said Circuit Court of Appeals as to the jurisdiction of the District Court, by holding that respondents' several claims if alleged to be based on "collective" rights can be aggregated for jurisdictional purposes, even though the evidence taken on the jurisdictional question is undisputed that no such collective rights are involved and the case is of the "spurious" type of class action, is an erroneous decision of an important question of general law and in conflict with the weight of authority.

4. The said decision of the said Circuit Court of Appeals as to jurisdiction of the District Court by holding that in a "spurious" type of class action the several claims of the plaintiffs could be aggregated for jurisdictional purposes, and in considering the value of collective rights not involved in the controversy, so far departs from the accepted and usual course of judicial proceedings, or so far sanctions such a departure by a lower Court, as to call for an exercise of this Court's power of supervision.

The reason why a stay is deemed necessary is that there is not sufficient time left within which to prepare and file said petition for said writ.

In support hereof appellees attach the professional state-
[fol. 97] ment of one of their counsel, W. M. McFarland of Omaha, Nebraska.

Wymer Dressler, Robert D. Neely, Counsel for Appellee, Charles M. Thomson, Trustee. J. M. Grimm, W. C. Fraser, W. M. McFarland, Counsel for Appellees George Kimball, Order of Railway Conductors, and Brotherhood of Railroad Trainmen.

I hereby certify that it is the bona fide intention of the appellees to make application to the Supreme Court of the United States for a writ of certiorari within the next thirty

(30) days, and that I believe there is merit in their case, and that the judgment of the United States Circuit Court of Appeals ought to be reversed by the Supreme Court of the United States.

W. M. McFarland, Counsel.

[File endorsement omitted.]

[fol. 98] In United States Circuit Court of Appeals

Order Staying Issuance of Mandate—May 17, 1941

On Consideration of the motion of appellees for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

May 17, 1941.

[fol. 99] In United States Circuit Court of Appeals

Praecipe for Transcript for Supreme Court, U. S.—Filed May 15, 1941

To the Clerk of the Circuit Court of Appeals:

Please complete the present printed record for presentation to the Supreme Court of the United States on application for certiorari by including the following:

Motion of appellees George Kimball et al. to dismiss.
Order of Court denying motion and withholding ruling on motion to affirm until final hearing.
Order of argument and submission.
Opinion.
Judgment.

Petition of Appellees for rehearing.
Order denying said petition.
Motion to withhold mandate.
Order granting said motion.

Wymer Dressler, W. M. McFarland, Attorneys for Appellees.

[File endorsement omitted.]

[fol. 100] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 101] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 45,467, U. S. Circuit Court of Appeals, Eighth Circuit, Term No. 139, Charles M. Thomson, Trustee for Property of Chicago & Northwestern Railway Company, et al., Petitioners, vs. Barney E. Gaskill, et al. Petition for a writ of certiorari and exhibit thereto. Filed June 6, 1941. Term No. 139 O. T. 1941.